Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

RONALD W. ERICKSON,
d/b/a RXR RAILROAD & DEPOT CO.
Petitioner,

v.

WASHINGTON STATE
DEPARTMENT OF NATURAL RESOURCES
Respondent.

On Petition for Writ of Certiorari to the Washington State Court of Appeals Division II

PETITION FOR A WRIT OF CERTIORARI
(corrected)

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QUESTIONS

Is the application of abandonment's "cessation of purpose/ use" doctrine on railroad property sold by a bankruptcy court a violation of the federal Supremacy Clause; Due Process; the Commerce Clause; the legislated intentions in congressional bankruptcy and transportation laws; or common law's 1881 "shifting public use" doctrine?

Did the Washington State courts or the State Department of Natural Resources act in violation of due process and outside of their legislated authority by applying abandonment's "cessation of purpose/ use" doctrine to legislated railroad easements through state lands in non compliance with RCW 79.36.500, the State Constitution, and the vested public rights of common law's "shifting public use" doctrine?

PARTIES TO PROCEEDING

There are no other petitioners in this proceeding. RXR Railroad & Depot Company is individually owned by Ronald W. Erickson.

There are no additional respondents other than the Washington State Department of Natural Resources. There are two non-participating defendants in this action: Olympic Eagle, Inc. and Warren L. Stetson Trust.

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March 8, 2006: The Supreme Court of Washington denied Petitioner's "Petition for Review" (App. C-1).

June 22, 2005: The State Court of Appeals Issued an "Order Denying Motion to Reconsider" (App. D-14).

May 10, 2005: The State Court of Appeals" issued their unpublished opinion (App. A-1).

Feb. 20, 2004: Jefferson County Superior Court issued an "Order Granting Department of Natural Resources' (DNR's) Motion for Summary Judgment Quieting Title in DNR and Dismissing All Remaining Claims" (App. E-15).

Dec. 12, 2003: The County Superior Court issued an "Order of Dismissal of Timber Claim" (App. F-18).

JURISDICTION

A. Federal Jurisdiction:

This writ of certiorari is to the Washington State Court of Appeals. The State Supreme Court denied Petitioner's "Petition for Review" (App. C-12). This Court has jurisdiction under 28 U.S.C. § 1257. The granting of abandonment on petitioner's rail property was repugnant to the bankruptcy and transportation laws of Congress, the Constitution and traditional common law doctrines.

B. Issues Were Raised in the State Courts[1]

The federal questions were timely raised and this Court has jurisdiction to review the judgment on a writ of certiorari. The lower courts had access to the Bankruptcy Court's Final Decree (CP 54) where it established,

> 6. On the Consummation Date all right, title and interest of the Trustee in the property of the Estate shall vest in and become the absolute property of the Reorganized Company nothwithstanding the laws of any state or the decision or order of any state authority to the contrary. Except as otherwise provided in this Order or in the Plan, the Reorganized Company shall take the property fee and clear of all claims, rights, demands, interests, liens and encumbrances of every kind and character. The Trustee is authorized and directed to execute and deliver to the Reorgnaized Company a deed and a bill of sale transferring all the property of the

[1] Abbreviations:
App. : Appendix to Petitioner's Writ of Certiorari;
app : Appendix to other document;
Chicago : Chicago Milwaukee & Puget Sound R.R. Co.; Chicago, Milwaukee & St. Paul Ry. Co.; or Chicago, Milwaukee, St. Paul & Pacific R.R. Co.;
CMC : CMC Real Estate Corp. as assigned trustee of the BANKR. CT.;
CP : Clerk Papers;
DNR : WA State Department of Natural Resources;
MOCD : WA Supreme Court's Motion to Overrule Clerk's Decision;
MR : WA Supreme Court's Petitioner's Motion to Reconsider;
OA : WA Court of Appeals' Oral Argument;
OB (AB in quotations) : WA Court of Appeals' Corrected Opening Brief of Petitioner;
PR : WA Supreme Court's Petitioner's Petition for Review;
PR-DNR : WA Supreme Court's PR Answer by Respondent;
RB-DNR : WA Court of Appeals' Respondent's Response Brief;
RB : WA Court of Appeals' Petitioner's Reply Brief;
JCOA : Jefferson County Superior Court Oral Argument on Motion for Summary Judgment.

Estate. . . . (App. N-41)

The federal issue was heard in the Jefferson County Superior Court's oral arguments in response to DNR's "Motion for Summary Judgment." In the ensuing oral presentations, petitioner was asked by interim Judge Spector,

> When you bought this property, the easements didn't exist anymore, so how are you saying that they somehow are – let me ask you the question and then you can respond. How are you, by virtue of law, how are you indicating or demonstrating in this court that somehow this still had a right of way as a railroad when you purchased it even though it had been long ago been [sic.] abandoned, some eighty years prior?"

Petitioner replied,

> . . . inferences that the sale abandonment [sic. abandons] is-is an inference. They sold it in good faith. They sold it. If it was abandoned, they wouldn't have sold it. . . they were - they were permissioned [sic.] by the bankruptcy court and if you read in the bankruptcy proceedings that they were entrusted to sell all of their assets. . . . The legislative grant of a railroad right of way is not just a simple contract. It can't be abandoned. It is a legislated right." (JCOA)

DNR's response was, "Yes, they were entrusted to sell their assets. They could only sell what they own. . . ." Interim Judge Julie Spector specifically declared, "I am going to grant summary judgment on behalf of DNR. I don't believe there is ANY [emphasis added] issue for the court."

The State Appellate Court simply passed on commenting on the State preempting federal bankruptcy law and affirmed that the actions before, by, and after the bankruptcy court's sale of property proved abandonment of the asset (UO 5, 6). This was done in spite of petitioner's specifically stating that "[t]he [bankruptcy] court authorized the disposition of RR [railroad] assets under Section 77 of the [1889] Bankruptcy Act (CP 113), and the 1985 Final Decree of Milwaukee's bankruptcy vested all its property to the new 'reorganized company, notwithstanding the laws of any state or the decision or order of any state authority to the contrary' (EA, CP 54)." (RB 22, App. N-41). Petitioner had also asserted that,

> Pre-bankruptcy abandonment claims are not valid after bankruptcy as all property and franchises survive a bankruptcy (Detroit 184 U.S. at 395, app r-29), and is subject only to the people or court (Paige 70 N.E. at 217, AB at 12, Northern 35 L.Ed 1097, app r-30). This is true of the Milwaukee bankruptcy (CP at 54, app r-31). (RB 14, OB 12)

In the appellate oral argument, DNR was asked by the judiciary why they failed to file a complaint with the bankruptcy court. Additional references to the record regarding the bankruptcy laws are found in App. O-43.

C. Request for Continuance

The record is unclear on the time of abandonment.

The Jefferson County Superior Court Interim Judge believed some "80 years ago" (JCOA, MOCD 7). The trial court ruled that Chicago had abandoned its rights under the various easements before DNR took any actions.

The Washington State Court of Appeal's opinion was not specific and cited actions before, during, and after the bankruptcy sale of property (UO 5). Because of the lack of clarity on the weight the court gave to specific evidence, before bankruptcy or by the bankruptcy trustee; and because the state courts passed on a number of issues: legislated easements being equal under the law to congressional railroad easements; interpreting the 1901 Wash. Laws 173 § 7 to grant immunity from the court granting an abandonment; the impact of the 1881 "shifting public use" doctrine; and railroads being public "roads" (OB 25, 27-34); petitioner requests the United States Court for a continuance of the cause to afford opportunity for amplification of the record disclosing the basis of decision.

CONSTITUTION AND STATUTE PROVISIONS

The pertinent provisions of the texts of the following are in the Appendix: U. S. CONST. art. 1 § 8 cl. 3; U. S. CONST. art. 1 § 8 cl 4; U. S. CONST. art. 6 § 2; U. S. CONST. Amend. XIV § l; 13 Stat. 365 (1864); 25 Stat. 180 (1889); 11 U.S.C. § 554(a) (1986); 11 U.S.C. § 1174 (1978); 28 U.S.C.

§ 1257 (1988); 45 U.S.C. § 915(d) (1995); 49 U.S.C. § 22301 (1993), THE TRANSPORTATION EQUITY ACT FOR THE 21ST CENTURY (1998); Wash. Rev. Code § 4.04.010 (1891); Wash. Rev. Code § 79.36.500 (2003); Wash. Rev. Code § 81.36.040 (1961); 1901 Wash. Laws 173; Fed. R. Civ. P. § 52(a) (1995); Fed. R. Bankr. P. § 3007-1 (1991); and the BANKR. N.D. LBR Rule 3007-1.

STATEMENT OF THE CASE

A. Proceedings in the Courts Below

On June 6, 2003, petitioner filed a "Complaint for Quiet Title, Timber Trespass, Declaratory Judgments and Injunctive Relief" (CP 1).

On September 4, 2003, petitioner filed an "Amended Complaint for Quiet Title, Declaratory Relief, Injunctive Relief and Damages" (CP 23).

On December 12, 2003, the Washington State Jefferson County Superior Court issued an "Order of Dismissal of Timber Claim" (App. F-18).

On February 20, 2004, after hearing oral argument, the Washington State Jefferson County Superior Court issued an "Order Granting Department of Natural Resources' (DNR's) Motion for Summary Judgment Quieting Title in DNR and Dismissing All Remaining Claims" (App. E-15).

On May 10, 2005, after hearing oral argument, the Washington State Court of Appeals filed their unpublished opinion affirming the Jefferson County Superior Court's order dismissing petitioner's complaint (App. A-1).

On June 22, 2005, The Washington Court of Appeals issued an "Order Denying Motion to Reconsider" (App. D-14).

On March 8, 2006, the Washington State Supreme Court signed an "Order" denying petitioner's "Petition for Review" (App. C-13).

On March 22, 2006, a "Mandate" for the Washington State Court of Appeals Div. II was issued (App. B-11).

On April 6, 2006, the Clerk of the State Supreme Court placed a "Motion for Reconsideration" in the file with no court action.

On May 6, 2006, the Clerk of the State Supreme Court placed in the file with no court action both a "Motion to Overrule Clerk's Decision." and a "Motion to Grant Determination."

B. Statement of the Facts

The 1901 Wash. Laws 173 created public railroad easements through state land (App. L-34).

In 1909 and 1910 Chicago acquired rail properties under the 1901 Wash. Laws 173 (CP 47-60, 65, 69, 74, 80, 85; OB 3).

December 19, 1977, Chicago, filed for bankruptcy reorganization in the Northern District of Illinois, Eastern Division. The final order was issued November 12, 1985, awarding all assets to trustee CMC (CP 23; CP 51; PR 3, 9).

CMC sold property as trustee of the bankruptcy court to Olympic Eagle, Inc. and Warren L. Stetson Trust recorded Sept. 2, 1993 (CP 113).

Olympic Eagle, Inc. and Warren L. Stetson Trust sold property to petitioner on Aug. 11, 1998 (CP 90).

The property never was developed (OB 3).

DNR did not file a complaint with the Bankruptcy Court challenging ownership of said rail properties.

ARGUMENT

A. Overview

This case, here on certiorari, is about the future of railroads in Washington State and the United States. This case features important considerations and questions in regard to the "Final Decree" in the bankruptcy of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (CP 51, App. N-41) and the Federal Rules of Bankruptcy

Procedure Rule 3007, BANKR. N.D. LBR Rule 3007-1 (App. M-39) that require challenges to title to be heard by the bankruptcy court.

This case is also about the unlawful application of two components of abandonment theory in Washington identified as the "cessation of purpose/ use" and "automatic reversion." Presumption of abandonment in this case was a violation of the federal Supremacy Clause, Commerce Clause, Due Process Clause (OB 4, RB 14, MOCD 4) and the bankruptcy laws of the United States, as well as being a violation of Washington's public trust doctrine on railroads (OB 38, 40, 42). The due process issue and bankruptcy issue was passed over by the court.

On the common law level, this writ of certiorari concerns the State Court's failure to determine if the 1881 "shifting public use" doctrine, modified in 1888 by WASH. REV. CODE § 81.36.040 (OB 7, 34; RB 1; PR 12, 13, App. K-32), was an additional public use of railroad rights of way exempting such from abandonment law. On the state level this case was about the state court's failure to interpret the 1901 Wash. Laws 173 § 7 (WASH. REV. CODE § 79.36.500, App. K-32, -34) exempting petitioner's easements from a state court judgment as an agent of the state granting a transfer of title through abandonment. On the state level,

this case is about the State Department of Natural Resources not having proper legislative authority to abandon public railroad rights of way through public lands (OB 43, PR 11). The state courts passed on these issues.

Petitioner claims equal due process under the Constitution to be exempt from abandonment law as are congressional railroad easements on public lands (OB 24, PR 10). Petitioner also argued by *pari materia* (OB 4, 31, 32, 38, 39; RB 21) that county road vacate orders would apply to revert state land easements to fee owners (OB 35).[2] The legislated laws that created petitioner's rights of way identified all easements through state lands as "roads"[3] (1901 Wash. Laws 173 § 1; OB 27-34; PR 17). The State Appellate Court found petitioner's property railroad easements only and not roads (UO 7).

B. THE WRIT SHOULD BE GRANTED Because it is About the Future of Railroading in America.

Petitioner swears:

> I purchased these railroad rights of way for rail development. The laws of Washington State require a rail office on rail property (WASH. REV. CODE § 81.36.070). I had first thought of using such an office to include a rail museum just as the Northern Pacific

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[2] *State v. Wright*, 529 P.2d 453, 457 (1974) citing *Connick v. Chehalis*, 333 P.2d 647 (1958).

[3] 1901 Wash. Laws 173 § 1, App. L-34.

Railroad had in Tacoma, after a court declaratory judgment affirming such use was appropriate. I explored public interest for a historic 1900 railroad timber harvest enactment conditioned upon a court's declaratory approval also.

Since my rail holdings adjoined near the intersections of three old un-vacated pre 1896 county cedar plank roads through then federal public lands, I spoke with Jefferson County Commissioners about a small magnetic "skateboard" or "pod" monorail system on such. I believed such was a possibility from the city of Forks on Highway 101 to the Olympic National Park, up and down the Hoh River Valley to the Olympic Park ocean beaches near Oil City (undeveloped) and south via Mason County to Olympia. These were historic trails upon which the infamous Iron Man of the Hoh carried his famous pot belly stove with a one hundred pound sack of flour therein. I formally recorded the existence of a one-mile portion of the forty-seven mile 1895, un-vacated county road called the "Pacific Road" for protection with the State Department of Archeology and Historical Preservation. I located additional miles of un-vacated county "plank" roads in adjoining Clallam County.

I was hoping to connect such plank roads with my Jefferson rail property under WASH. REV. CODE § 81.36.040 and onto my rail holdings in Port Angeles for a portion of a rail route around the Olympics. My original intent was to create a small magnetic monorail system to accommodate handicapped visitors to the Olympic Peninsula and its International Park. Later this dream evolved into the possibility of resurrecting old railroad rights of way from Chicago to the Pacific.

The Jefferson County Commissioners were not interested in developing or assuming ownership of "easements" at that time, but were open to listening to a proposal to replace the Upper Hoh Road as such was the most costly county road to maintain. I did not proceed with any application for some of the $17,500,000,000 of federal money available yearly from 1998 to 2003 for light rail development (49 U.S.C. § 22301(e) [App. I-27], OB 25, OB app G[4]).

DNR's challenge to my ownership interfered in dialogues with potential supporters. The State Land Commissioner, Doug Sutherland, denied seeing me about that possibility instead of this litigation. The State DNR also interfered with my prior negotiations with Mr. Middleton by acquiring his adjoining sec. 16 rail rights (CP 94, 96). I had a dream and I do not like giving it up. I still believe it is possible for Congress to reclaim some of the old land-grant roads (appropriate English for "land-grant railroads") for future public uses. And, I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

C. THE WRIT SHOULD BE GRANTED Because it Affects Many Similar Railroad Rights of Way Through State Lands and Future Uses Thereof.

There are over three-hundred forty-three legislated public railroad acquisitions similar to petitioner's through state lands (PR 4, PR app A, App. S-60) from about sixty different corporations (App. R-57). There are sixty-seven acquisitions on state lands by federal land-grant railroad

[4] THE TRANSPORTATION EQUITY ACT FOR THE 21ST CENTURY, Pub. L.No. 105- 178, codified in scattered sections (1998), App. J-29.

companies amounting to 540 acres (App. Q-53). There were seventy-five acquisitions by "Chicago" on state lands representing about 700 acres (App. P-47). Although these facts were not known to the lower court, they were known to DNR. All of these rail rights were created by the state legislature outside of eminent domain proceedings or the threat of condemnation. As such abandonment doctrine must not apply to petitioner's legislated easements (OB 15; ACOA; MR 6, 9).

D. THE WRIT SHOULD BE GRANTED Because It Affects the Fluctuating Administrative Policies of the Washington State Department of Natural Resources in Regard to Railroad Properties.

Rule 52(a) of The Federal Rules of Civil Procedure sometimes allows federal courts to hear new evidence to correct erroneous facts. In this case, DNR has argued abandonment preempting the federal bankruptcy rules, Fed. R. Bankr. P. § 3007, BANKR. N.D. Ill. LBR 3007-1 and the BANKR. Court's Final Decree for Chicago. However, DNR willfully concealed from the lower courts DNR's relinquishing of their abandonment claim with Chicago in 1978 (App. U-68). Three letters from Chicago between 1975 to 1978 resulted in State Land Commissioner Bert Cole ordering a recorded department order reversing DNR's assertion of title on nearly adjoining railroad rights of way

(App. T-61). The third letter (App. T-67) was after Chicago filed bankruptcy in 1977 (Cp 23). DNR knew this.

This Court could consider this information to issue an opinion about the importance of introducing such facts after a judicial time of discovery when there is no "examination of character of the witness" (DNR) or when there is no jury.[5]

DNR also preempted federal bankruptcy laws by voiding a Jefferson County tax sale of rail rights on adjoining section 16 claiming prior abandonment (CP 94, 96, RB 12). Tax sales transfer railroad property rights (OB 11).

E. THE WRIT SHOULD BE GRANTED to Determine Whether the Granting of Abandonment of Petitioner's Railroad Easements by the State of Washington Preempts Federal Bankruptcy Laws.

Article I, Section 8, Clause 4 of the Constitution provides that Congress shall have the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." The final decree of the Chicago bankruptcy specifically decreed that, ". . . nothwithstanding the laws of any state or the decision or order of any state authority to the

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[5] Fed. R. Civ. P. § 52(a) [28 U.S.C. app. § 52(a) (1995) at 781 *Notes of advisory committee on Rules – 1985 Amendment* citing: *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S. Ct. 1949, 1958 (1984); *Pullman Standard v. Swint*, 456 U.S. 273, 293 (1982); *United States v. General Motors Corp.*, 384 U.S. 127, 141 n. 16 (1966); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-96 (1948)].

contrary . . . . the Reorganized Company shall take the property free and clear of all claims, rights, demands, interests, liens and encumbrances of every kind and character. . . ." (App. N-42).

The State of Washington follows "the common law, so far as it is not inconsistent with the Constitution and laws of the United States. . . ."[6] Common law will also not be allowed to control where the conditions are those not contemplated by the common law[7] (OB 23, MOCD 3). Bankruptcy of huge railroad corporations are one such condition.

The State failed to file a challenge to title in the bankruptcy court[8] in 1978 and now cited evidences that occurred before, during, and after bankruptcy to prove abandonment (UO 1, 5). All claimable property transfers into the bankruptcy court (OB 8, MOCD 12).[9]

Simply stated, the State preempted federal bankruptcy laws by claiming the sale of a railroad asset a cause of abandonment when sold to pay debts (JCOA, PR-

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[6] WASH. REV. CODE § 4.04.010, App. K-32.

[7] 15A AM. JUR. 2D *Common Law* § 12 (2001) at 577.

[8] BANKR. N.D. Ill. LBR 3007-1(B) (2) (B).

[9] *Segel v. Rochelle*, 382 U.S. 375, 378, 86 S. Ct. 511, 15 L.Ed.2d 428, 431 (1965), superseded by statute, *Segal v. Rochelle*, 336 F.2d 298, 300 (1964) *reh'g. denied.*

DNR 13). "The Standard of Review and Preemption Standards" has concluded that, "Whether federal law preempts state law turns principally on congressional intent. U.S.C.A. Const. Art. 6, cl. 2."[10] The "reorganized court and the Interstate Commerce Commission have exclusive authority over abandonment of railroad lines and such authority is not limited to discontinuation of rail service but also includes disposition of rail property."[11]

For a state court action to diminish a value of a transferred asset by asserting an intent by the court to abandon such when intent is to ". . . reduce to money all of the property of the estate . . ."[12] is counterproductive to congressional intent to raise money for debtors. It is also counter to the Commerce Clause allowing congressional jurisdiction by the bankruptcy court on rail property through reorganization and Congress' intent to support magnetic light rail development [13] (OB 25, RB 22, MOCD 5, App. I-27, J-31).

Similarly, DNR's objection ". . . long after the plan

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[10] *Millsaps v. Thompson,* 259 F.3d 535, 538 (6th Cir. 2001).

[11] *In re Matter of Boston &Maine Co.*, 596 F.2d 2, 5 & 7 (1st Cir. 1979).

[12] 11 U.S.C. § 1174.

[13] THE TRANSPORTATION EQUITY ACT FOR THE 21ST CENTURY, Pub. L.No. 105- 178, codified in scattered sections (1998), App. J-29.

had been approved and long after it had been confirmed is too [**13] tardy an application to deserve consideration and one we think it[is] not contemplated at that stage under the Bankruptcy Act"[14] (PR 9).

The railroad easement asset was assigned to CMC as a trustee of the bankruptcy court as noted on deed of sale (CP 113). The bankruptcy court did not order abandonment[15] of the property but allowed its sale (CP 113). The State cited the common law of "cessation of purpose/ use" to abandon a bankruptcy railroad sale at time of sale (RB-DNR 11, 12; UO 5). However, trustees of the bankruptcy court are the only agent to grant abandonment after a notice and hearing.[16]

Washington court actions directly challenge the federal bankruptcy authority to lawfully transfer property (CP 47-54; OB 8, 12; RB 14). "Only the trustee is expressly authorized under the Bankruptcy Code to abandon property of the estate."[17] Congress specifically intended the bankruptcy court to reassign railroad property for railroad purposes[18] to whomever they chose. "It is immaterial that the

[14] *In re Chicago, Rock Isand & Pacific Ry. Co.,* 168 F.2d 587, 593, (7th Cir.1948); *cert. denied* 335 U.S. 855 (1948).

[15] 11 U.S.C. § 554 (b) 1986), App. I-25.

[16] See *Id.* §§ 554, 1174 (1978), App. I-25.

[17] *In re Wideman,* 84 B.R. 97, 101 (Bankr. W.D. Tex. 1988).

[18] 45 U.S.C. §§ 915 (1995), 903 (1979), 904 (1979), App.I-26.

exercise of that power conflicts with state enactments[19] . . . **notwithstanding the laws of any state or the decision or order of any state to the contrary** (emphasis added)."[20] A railroad bankruptcy court's jurisdiction ". . . is not limited to the prevention of interference with the use of the property by the trustee; it 'extends to the adjudication of questions respecting the title.' *Ex parte Baldwin*, 291 U.S. 610, 616; *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 140."[21]

F. THE WRIT SHOULD BE GRANTED to Bring Clarity in the Application of Abandonment's Automatic Reversion and "Cessation of Purpose/ Use" Doctrines so as to be Lawfully Applied in Harmony With the Public Trust Vested by Common Law's 1881 "Shifting Public Use" Doctrine.

1. "Automatic Reversion"

Abandonment's "automatic reversion" to fee owner was established in *Morsbach v. Thurston County.*[22] (OB 12, 13,23, PR 9-11). In Washington "[w]hen a railroad abandons an easement, the right of possession reverts to the landowner. *Roeder Co. v. Burlington N. . . .*" (UO 5, *E.g.*, App.A-5).

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[19] *Chicago*, 168 F.2d at 590; *See Callaway v. Benton*, 336 U.S. 132, 148 (1948), e.g.; *Commonwealth of Massachuesetts v. Bartlett*, 266 F. Supp. 390, 393 (D. C. Mass. 1967) (Court upheld state needed ICC and BANKR. CT. approval before taking ownership of rail property).

[20] *Chicago*, 168 F.2d at 617, App. N-42.

[21] *Gardner v. New Jersey*, 329 U.S. 565, 567 (1946).

[22] *Morsbach v. Thurston County*, 278 P. 686, 690 (1929), *E.g.*

Such doctrine, however, is unlawful to apply to all easements. "Automatic reversion" is unconstitutional in regard to federal land-grant roads [railroads]. The federal courts have affirmed that land-grant roads are a "special creation" of Congress and exempt from the common law of abandonment (OB 24, PR 10).[23] *Idaho v. Oregon Short Line R.R. Co.* affirmed,

> . . . Congress had authority, by virtue of its broad power over interstate commerce, to grant such easements subject to its own terms and conditions. . . . Congress could pre-empt or override common law rules regarding easements, reversions, or other traditional real property interests.[24]

"Automatic reversion" must not apply until such land-grant roads are "extinguished" by Congress as per the Enabling Land Grant agreement, State Enabling Act, 25 Stat. 180 § 10 (OB 34, App. H-23). The United States Attorney General signed off such interests in *Boise Cascade v. Union P. R.R. Co.*.[25] Congress in The Statutes at Large

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[23] *Barney v. Burlington N. R.R. Co.*, 490 N.W.2d 726, 729 (S.D. 1992) *cert. denied* 507 U.S. 914 (1993); Cf. *Puett v. Western Pacific R. Co.*, 752 P.2d 213, 217 (Nev. 1988) (common law easement of necessity not applicable to grants of Congress); *See generally: Leo Sheep Co. v.United States*, 440 U.S. 668, 688 (1979) (liberal interpretations to retain intent of grantors); OB 15, 18, 24, 44 citing *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837) in app Q-10, -18; *E.g.*

[24] *State of Idaho v. Oregon Short Line R.R. Co.*, 617 F.Supp. 207, 212 (D.C. Idaho 1985).

[25] *Boise Cascade v. Union P. R.R. Co.*, 630 F.2d 720, 723 (10th Cir. Utah 1980).

retained additional rights on the Northern Pacific Railroad Company's land-grant road. The grant reads,

> '. . . to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in the time of war) the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend or repeal this Act.' 13 Stat. at L. 366, 368, 372 [sic].[26] (App. H-23)

Similarly, petitioner's railroad easements are creations of a state legislature (1901 Wash. Laws 173; OB 29, 30) with no other restriction than to be used for railroad purposes. Both were created outside the arena of railroads exercising their eminent domain powers acquiring property under a threat of condemnation (ACOA, PR 7). Under the Constitution's Equal Due Process, "automatic reversion and "cessation of purpose/ use" doctrine must not apply. Legislated and congressional railroad easements must be treated the same (OB 24) having been created under laws of a "different color"[27] than eminent domain acquisitions (OB 15). Due process does apply (OB 43; RB 14; MOCD 4,16). State courts have historically ruled that, ". . . a resolution . . .

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[26] *Northern Pacific R.R. Co. v. Territory of Washington,* 142 U.S. 492, 493 (1891).

[27] *Internet "L.O.L." Inc. v. Dry Humor,* 8 U.S. 2, 4 Good Constitutions 2006, 1 New Ed. 2006 (June 6, 2006).

authorizing private persons to construct and operate a railroad upon certain conditions, without limitation as to time, or reserving a power of revocation, was not a license, nor an act of municipal legislation merely, but a contract, which if valid, it could not abrogate.[28]

"Automatic reversion" also must not be presumed to apply to three Washington railroad companies' acquisitions as the Washington Territory Legislature established all such acquisitions to be in "fee" since the 1850's (OB 30, 36).

2. "Cessation of Purpose/ Use" Doctrines

The "cessation of purpose/ use" doctrine (OB 23) says (UO 5), ". . . conveying a public easement for a private use abandons the easement. *Brewer and Taylor Co. v. Wall*, 299 Ark. 18, 769 S.W.2d 753, 756 (1989)."

Many courts have applied such doctrine to rule non railroad public use proves abandonment. *Morsbach v. Thurston County; Schnabel v. DuPage County*; and *Lawson v. State*; *King County v. Squire Inv. Co.*[29] are examples.

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[28] *Metropolitan C. R.R. Co. v. Chicago W. D. R.R. Co.*, 87 Ill. 317 (1877).

[29] *Morsbach* 278 P. 686, 687 (easement gift to county by railroad); *Schnabel v. DuPage Cy.*, 428 N.E.2d 671, 673 (1981) (railroad conveyed to county, county granted a ten year lease for public trail); *Lawson v. State*, 730 P.2d 1308, 1310 (1986) (state acquired railroad esaement for trail use); *King County v. Squire Inv. Co.*, 801 P.2d 1022, 1023 (1991) (King County acquired railroad easement for trail use); *E.g.*

Here intent to build public trails (primitive roads) was found to bring abandonment. If the "cessation of purpose/ use" component of abandonment is found to be inadequate, then compatible non-conflicting uses may be considered acceptable as "abuses or misuses" of railroad rights of way (RB 9).

A modern definition of abandonment is,

> . . . voluntary relinquishment of property or a right by the owner or holder, with the intention of termnating ownership and without vesting ownership in another person. Abandonment is composed of two elements, an intention to reliquish the right or property without intending to transfer title to any particular person and the external act by which such intention is carried into effect; both elements must concur. See Roebuck v. Macosta County Road Commission, 229 N. W.2d 343, 59 Mich. App. 128. . . .[30] (App. V-70)

Traditionally abandonment had a "destructive" element (OB 16) or an "act to repudiate ownership[31] (OB 17, PR 13). Is this no longer a necessary component to bring abandonment? Presumed "automatic reversion" founded on a "cessation of purpose/ use" doctrine is a violation of the current congressional intent to encourage future rail development under the Constitution's Commerce Clause for use as light rail development such as a magnetic levitation

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[30] *The Attorney's Pocket Dictionary,* (visited Aug. 21, 2003), at http:// www.landlords-tenants.com/dictionary.asp?wordsstr=abandonment.

[31] *Martel v. Stewart,* 628 P.2d 1069, 1071 (1981).

monorail system (OB 25, App. I-27, J-31).[32]

3. 1881 "Shifting Public Use" Doctrine

Presault v. U.S.[33] (RB 9, PR 12) made reference to common law's 1881 "shifting public use" doctrine affirming that, "Under the doctrine of shifting public use, when an easement is given for public use, such as a railroad, and then put to another similar use, no abandonment will be held to have occurred. . . ."

Washington State accepted the "shifting public use" doctrine with a modification in 1888, WASH. REV. CODE § 81.36.040 (PR 12 [typo. Error], App. K-32) and called railroads "roads" in its legislation (1901 Wash. Laws 173 § 1; OB 25, 27-34; App. L-34). The State intended railroads to be treated as public roads. If abandonment law ONLY applies to railroads that are ONLY railroad easements and nothing more as petitioner argued (OB 2, 4, 12; UO7) and the "shifting public use" doctrine is applicable, then abandonment law would not apply!

Earlier decisions of the courts made a distinction between conveyance of public easements for public or private use. The lower courts in *Lawson v. State* and

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[32] THE TRANSPORTATION EQUITY ACT FOR THE 21ST CENTURY, Pub. L.No. 105- 178, codified in scattered sections (1998), App. J-29.

[33] *Presault v. U.S.*, 24 Cl.Ct. 818, 832 (1992).

Morsbach v. Thurston County illustrate the acceptability of public use. *Brewer v. Wall* applied to petitioner (UO 5) illustrates that private use abandons.[34] Justice Utter in the dissenting opinion of *Lawson v. State*[35] (OB 40) affirmed viable public use. Many people would benefit if this Court affirmed public use of railroads as permissible under the "shifting public use" doctrine.

Public uses of railroads fell out of practice when the federal courts granted exclusive use to railroads in 1942 (OB 33, citing *Puett v. Western* 752 P.2d 213, 216 (Nev. 1988). DNR argued that "shifting public uses" had to occur immediately after disuse (PR-DNR 12). The State Court of Appeals claimed petitioner's easements were only easements and not roads (UO 7). Petitioner considered proposing public trail use of such in a cultural assessment plan to protect and use the adjoining county "Pacific Road" if abandonment of the railroad easements was established by the courts.

G. THE WRIT SHOULD BE GRANTED to Interpret the 1901 Wash. Laws 173 § 1&7 to Find Any Court or Agency Granting Abandonment on Railroad Easements Through State Lands Unlawful and a Violation of Due Process.

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[34] *Brewer v. Wall*, 769 S.W.2d 753, 756 citing *Contractors, Inc. v. Livingston*, 669 S.W.2d 457 (1984).

[35] *Lawson* 730 P.2d 1308, 1320-321 citing *State es rel. Washington Wildlife Preservation, Inc. v. Minnesota Dep't of Natural Res.*, 329 N.W.2d 543 (Minn.), *cert. denied*, 463 U.S. 1209 (1983).

Simply stated, The 1901 Wash. Laws 173 § 7 (WASH. REV. CODE § 79.36.500, App. K-32) guarantee that all other "grants" of the state shall be subject to the railroad rights of way (OB 5, 13; PR 6; App. L-38). This is the "exclusive" clause or immunity clause petitioner referred to in his briefs (OB 113, PR 8). Black's definition of "grant"[36] is a transfer of title. Black's Law Dictionary reads,

> **grant**, *n.* 1. An agreement that creates a right of any description other than the one held by the grantor.* Examples include leases, easements, charges, patents, franchises, powers, and licenses. 2. The formal transfer of real property. 3. The document by which a transfer is effected; esp., DEED. 4. The property or property rights so transferred.

The establishing of abandonment by a court or DNR is a transfer of title. The lower courts were in error to grant abandonment if such was a violation of due process (OB 43; RB 14; PR 16; MOCD 4, 16). Federal preexisting railroads to the 1896 Enabling Land Grants to Washington State complied with the 1901 Wash. Laws 173 § 1 and payed full market value for their easements (App. L-35). These congressional land-grant roads (13 Stat. 365, 370, 372 (1864), App. H-23) are exempt from abandonment as previously established (certiorari at 18, 19). The state court only interpreted the 1901 Wash. Laws 173 to create

[36] BLACK'S LAW DICTIONARY 707 (7th ed. 1999).

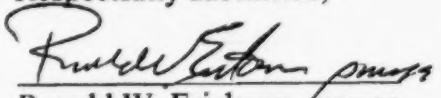
easements and passed on interpreting the "exclusive" or "immunity clause" (WASH. REV. CODE § 79.36.500, OB 44, App. K-32). DNR processing any abandonment on federal land-grant roads through state lands would be a violation of the federal right to regulate its own commerce. Petitioner sought similar due process protection as a legislated right.

CONCLUSION

Continuance of the present administrative policies and unchallenged abandonment doctrines in the State of Washington will present additional embarrassments in the future for the State and the courts.[37] The decision of this Court could benefit many people and honor the congressional intent to empower a future for light rail development.

For the foregoing reasons, petitioner humbly requests the United States Supreme Court to grant this petition for a writ of certiorari to review the judgment of the Washington State Court of Appeals, Division II.

Respectfully submitted,



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[37] *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955).

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

[Court filing stamp
Dated: May 10, 2005]

RONALD W. ERICKSON, a single person
d/b/a/ RxR DEPOT & RAILROAD COMPANY,
Appellant,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,
Respondent,

OLYMPIC EAGLE, INC.,
WARREN L. STETSON TRUST,
Defendants

No. 31569-6-II
UNPUBLISHED OPINION

BRIDGEWATER, J. -- Ronald W. Erickson appeals summary judgment quieting title to unused, abandoned railroad easements he had purchased from the Washington State Department of Natural Resources (DNR). Erickson purchased these easements from Olympic Eagle, Inc. for $1,500. We hold that because the easements granted to the Chicago Milwaukee Railroad **31569-6-II, Page 2** (Chicago) in 1909 were never developed and were

abandoned, they reverted to DNR; thus, Erickson, as a subsequent grantee, acquired no interest when he purchased them. We affirm.

In 1909, DNR granted Chicago easements over several sections of state land south of Forks, Washington. Chicago never developed the easements into a railroad or laid any tracks on any of the DNR easements. It also did not acquire right-of-ways over intervening private tracts of land that connected the DNR easements to create a rail corridor. During the 1920s, Highway 101 was built parallel to the DNR easements.

Chicago filed for bankruptcy in 1977. 45 U.S.C. §§ 904 and 915(a) (1987) (Milwaukee Railroad Restructuring Act) authorized the reorganization court to abandon Chicago's railroad lines. Under the bankruptcy reorganization plan, Chicago sold its operating lines to another railroad. It also sold off some of its non-operating right-of-ways in Washington to non-rail companies. Jefferson County foreclosed on one of Chicago's easements located in Section 16 because of failure to pay taxes on the easement. The Jefferson County Treasurer's Office notified DNR that the property taxes on the easements were unpaid and invited DNR to attend the tax foreclosure sale. DNR told the treasurer's office that the right-of-ways were easements that it had granted to Chicago and that it was the fee owner. The treasurer's office dropped the easements

from its foreclosure sale.

Chicago conveyed the DNR easements to Olympic Eagle and the Warren L. Stetson Trust, by quitclaim deeds. Chicago stopped paying property taxes on the easements. Olympic Eagle acquired the quitclaim deed in order to harvest the timber within the right-of-ways, but it was not engaged in any rail activities. **31569-6-II, Page 3**

Olympic Eagle held the deeds until 1998, when it conveyed the remaining interest to Ronald Erickson for $1,500. On the real estate excise tax affidavit, the Jefferson County Assessor's Office noted that the right-of-ways had already been removed from the tax rolls based on advice from the prosecuting attorney.

In September 2003, Erickson sued DNR, Olympic Eagle, and the Warren L. Stetson Trust to quiet title, for declaratory and injunctive relief, and for damages. On January 16, 2004, DNR moved for summary judgment. In its motion, it asked the trial court to quiet title in the properties in DNR and to dismiss the remainder of Erickson's claims. The trial court granted DNR's motion. Erickson appeals.[1]

I. Standard of Review

We review an order of summary judgment de novo. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274

[1] Olympic Eagle and the Warren L. Stetson Trust are not parties in this appeal.

(2003). We perform the same inquiry as the trial court: reviewing the facts and reasonable inferences drawn from them in the light most favorable to the nonmoving party. *Smith*, 150 Wn.2d at 483; *Goad v. Hambridge*, 85 Wn. App. 98, 102, 931 P.2d 200, *review denied*, 132 Wn.2d 1010 (1997). Summary judgment is appropriate only if no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. CR 56(c). We grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 630-31, 71 P.3d 644 (2003). **31569-6-II, Page 4**

II. DNR's Declarations

Erickson argues that there were insufficient facts to support statements made in some of DNR's affidavits, but Erickson failed to object to the affidavits DNR submitted in support of its motion for summary judgment. Where a party fails to object or moves to strike before entry of summary judgment, the party is deemed to have waived any deficiency in the affidavit. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979). Nothing in the record shows that Erickson objected or moved to strike any portion of DNR's affidavits. Thus, he waived this argument.

III. The Law of Abandonment

Erickson next argues that the trial court erred when it

applied abandonment theory to the easements. He contends that evidence of nonuse is insufficient to show abandonment.

Five right-of-ways are at issue. The Laws of Washington 1901, chapter 173, granted right-of-ways to railroad companies. The legislature called these right-of-ways easements. Laws of Washington 1901, ch. 173 § 7.

In Washington, when a railroad easement ceases to exist, it is abandoned. *Morsbach v. Thurston County*, 152 Wash. 562, 568-69, 278 P. 686 (1929). Abandonment is determined by looking at several factors to infer intent. J.A. Connelly, Annotation, *What Constitutes Abandonment of a Railroad Right of Way*, 95 A.L.R.2d 468, 470 (1964). Generally, courts do not find abandonment merely due to nonuse. *Netherlands Am. Mortgage Bank v. E. Ry. & Lumber Co.*, 142 Wash. 204, 208, 252 P. 916 (1927). There are, however, situations where courts have found abandonment due to nonuse when other evidence shows intent to abandon the right-of-way. *Zobrist v. Culp*, 95 Wn.2d 556, 562, 627 P.2d 1308 (1981). **31569-6-II, Page 5**

When a railroad abandons an easement, the right of possession reverts to the landowner. *Roeder Co. v. Burlington N., Inc.*, 105 Wn.2d 567, 571, 716 P.2d 855 (1986). If a subsequent grantee acquires the deed after the easement is abandoned, the grantee acquires nothing. *Roeder Co.*, 105 Wn.2d at 571. Thus, the easements in this

case reverted back to the DNR when Chicago abandoned them. *Hanson Indus., Inc. v. Spokane County.*, 114 Wn. App. 523, 536, 58 P.3d 910 (2002), *review denied*, 149 Wn.2d 1028 (2003).

Here, several factors besides nonuse support a finding that Chicago abandoned its easements. First, Chicago never established a rail corridor or developed a rail line.

Furthermore, Chicago failed to acquire rights over other intervening private lands. The intervening lands were necessary to link up the easements into a rail corridor. Also, Highway 101 was constructed parallel to the easements in the 1920s.

Finally, rather than keep the easements, Chicago sold them to Olympic Eagle, a timber company. Chicago allowed Jefferson County to foreclose an easement located in Section 16 by failing to pay taxes on it. Jefferson County notified DNR that it planned to sell other DNR easements at a tax foreclosure sale. In order to avoid the foreclosure sale, Chicago sold its five remaining parcels.

In other jurisdictions, conveying a public easement for a private use abandons the easement. *Brewer and Taylor Co. v. Wall*, 299 Ark. 18, 769 S.W.2d 753, 756 (1989). Similarly here, nothing suggested that Olympic Eagle intended to use the easements for rail activities. In fact, Christina Nyhus, Olympic Eagle's vice president, declared

that the company had no intent to use the easements for railroad purposes. **31569-6-II, Page 6**

Erickson also asserts that RCW 81.36.070 authorized the sale of the right-of-way by Chicago to Olympic Eagle. But RCW 81.36.070 only authorizes the sale of a railroad to another railroad. Olympic Eagle was a timber company and not a railroad. Thus, RCW 81.36.070 is inapplicable.

Further, RCW 84.12.310 does not provide that railroads can keep an unused railroad right-of-way. Chapter 84.12 RCW deals with assessment and taxation of public utilities. RCW 84.12.310 states:[,]

> For the purpose of determining the system value of the operating property of any such company, the department of revenue shall deduct from the true and fair value of the total assets of such company, the actual cash value of all nonoperating property owned by such company. For such purpose the department of revenue may require of the assessors of the various counties within this state a detailed list of such company's properties assessed by them, together with the assessable or assessed value thereof: PROVIDED, That such assessed or assessable value shall be advisory only and not conclusive on the department of revenue as to the value thereof.

This statute only addresses the tax assessment of property held by interstate utilities. It does not discuss the legal right to either [sic] hold or abandon nonoperating rail easements. Erickson's reliance on this statute is misplaced.

The evidence establishes a long period of nonuse and

several actions Chicago took supporting abandonment of the easements. Thus, the trial court did not err when it applied the law of abandonment and granted summary judgment for DNR.

IV. Franchise Law

Erickson asserts that the Laws of 1901, chapter 173 created a franchise in favor of Chicago and that the franchise could not be abandoned without legislative consent. We disagree. **31569-6-II, Page 7**

A franchise is "the right granted by the state or a municipality to an existing corporation or to an individual to do certain things which a corporation or individual otherwise cannot do." *Wash. Water Power Co. v. Rooney*, 3 Wn.2d 642, 649, 101 P.2d 580 (1940) (quoting EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS, § 1740 (2d ed. 1943)). In contrast, an easement is a privilege granted to use another's land in a specific manner. *State ex rel. Shorett v. Blue Ridge Club*, 22 Wn.2d 487, 494, 156 P.2d 667 (1945). The Laws of 1901, chapter 173 granted only easements in the land and nothing more.

Erickson's reliance on *State ex rel. Grinsfelder v. Spokane St. Ry. Co.*, 19 Wash. 518, 53 P. 719 (1898), is misplaced. That case dealt with street franchises and is inapplicable to the easements granted under the Laws of 1901, chapter 173.

Erickson also has no claim to the timber located on the easements. The easements at issue in this case encumbered state trust lands. The federal government conveyed these trust lands to the state under the Enabling Act when Washington was admitted as a state. 25 Stat. 676 (1889) [25 Stat. 180 (1989) at 676]. The legislature granted Chicago a right to use the easements for rail-related activities. Those activities included the harvesting of timber. However, once Chicago abandoned the easements, it abandoned any incidental rights to timber that went with the easements, since the land and all incidental rights reverted back to the DNR.

V. Inapplicable Statutes / Unreviewable Issues

Erickson directs our attention to several statutes, RCW 47.30.070, RCW 79.36.400, RCW 47.76.240, and county vacation statutes. None of these statutes pertain to his claim. The grant to Chicago was an easement; it was not intended to be a public highway and the railroad was never constructed for the public's [sic.] benefit. **31569-6-II, Page 8**

Erickson raises the following issues for the first time on appeal: (1) the constitutionality of RCW 34.05.010(3)(c); (2) whether the Chicago right-of-ways are entitled to cost-free highway crossings; (3) whether he is entitled to a finder's fee; and (4) whether he is entitled to legal fees under RCW 81.53.190.

RAP 2.5(a) allows appellate courts to review issues raised for the first time on appeal but in order to do so, the issue must fit under one of a limited group of exceptions. Those exceptions are: "(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a). None of Erickson's new issues falls under an exception. Thus, these issues are not properly before this court. *Hernandez v. Dep't of Labor & Indus.*, 107 Wn. App. 190, 199, 26 P.3d 977 (2001).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

/s/ Bridgewater
Bridgewater, J.

We concur:

/s/ Morgan
Morgan, J.

/s/ Quinn-Brintnall, CJ
Quinn-Brintnall, C.J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

RONALD W. ERICKSON, a single person,
d/b/a RxR DEPOT & RAILROAD COMPANY

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF NATURAL RESOURCES;

Respondent,

OLYMPIC EAGLE, INC.;
WARREN L. STETSON TRUST,

Defendants.

No. 31569-6-II

MANDATE

Jefferson County Cause No. 03-2-00213-4

The State of Washington to: The Superior Court of the State of Washington in and for Jefferson County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on May 10, 2005, became the decision terminating review of

this court of the above entitled case on March 8, 2006. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs and attorney fees have been awarded in the following amount:

Judgment Creditor, Respondent, State of WA Dept. of Natural Resources, et al, $268.00[;]

Judgment Debtor, Appellant, Ronald W. Erickson, $268.00[.]

[Page 2
Mandate 31569-6-II]

SEAL
(deleted for printing)

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 22nd day of March, 2006.

/s/ David Ponzoha
Clerk of the Court of Appeals
State of Washington, Div. II

Cheryl Ann Nielson
Attorney at Law
Atty Gen Ofc Nat Res Div[.'s]
PO Box 40100
Olympia, WA 98504-0100

Ronald W. Erickson
934 West Lauridsen # 205
Port Angeles, WA 98363

James R. Schwartz
Attorney General's Office
PO Box 40117
Olympia, WA
98504-0117

Hon. Julie Spector, Pro Tem
Jefferson County Superior Court Judge
PO Box 1220
Port Townsend, WA 98368

APPENDIX C

THE SUPREME COURT OF WASHINGTON

RONALD W. ERICKSON, a single person,
d/b/a RxR DEPOT & RAILROAD COMPANY

Petitioner,

v.

WASHINGTON STATE
DEPARTMENT OF NATURALRESOURCES;

Respondent,

OLYMPIC EAGLE, INC.;
WARREN L. STETSON TRUST

Defendants.

No. 77447-1
ORDER
C/A NO. 31569-6-II

Department II of the Court, composed of Chief Justice Alexander and Justices Madsen, Bridge, Owens, and J. M. Johnson (Justice Fairhurst sat for Justice Bridge, and Justice C. Johnson sat for Justice Owens), considered this matter at its March 7, 2006, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

Dated at Olympia, Washington this 8th day of March, 2006.

For the Court's
/s/ Gerry L. Alexander
Chief Justice

APPENDIX D

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

RONALD W. ERICKSON, et al, Appellants,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES; et al, Respondents

No. 31569-6-II

ORDER DENYING MOTION TO RECONSIDER

APPELLANT moves for reconsideration of the court's decision terminating review, filed **May 10, 2005.** Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Quinn-Brintnall, Morgan, Bridgewater

DATED this 22nd day of June, 2005.

FOR THE COURT:

/s/ Christinea Sue Quinn-Brintnall
CHIEF JUDGE

Cheryl Ann Nielson
Attorney at Law
Atty Gen Ofc Nat Res Div
PO Box 40100
Olympia, WA 98504-0100

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934 West Lauridsen # 205
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APPENDIX E

STATE OF WASHINGTON
JEFFERSON COUNTY SUPERIOR COURT

RONALD W. ERICKSON,
a single person, d/b/a RxR DEPOT & RAILROAD COMPANY Plaintiff,

v.

WASHINGTON STATE DEPARTMENT OF NATURALRESOURCES; OLYMPIC EAGLE, INC.; WARREN L. STETSON TRUST,

Defendants.

No.03-2-00213-4

ORDER GRANTING DEPARTMENT OF NATURAL RESOURCES' (DNR'S) MOTION FOR SUMMARY JUDGMENT QUIETING TITLE IN DNR AND DISMISSING ALL REMAINING CLAIMS

CLERK'S ACTION REQUIRED: DISMISSAL OF TRIAL DATE

This matter came before the Court on the Defendant's, Washington State Department of Natural Resources' (DNR's), motion for summary judgment quieting to the property described in Exhibit A to this order, dismissing all of Plaintiff's remaining claims, and directing the Clerk of the Court to strike the trial date.

The Court heard oral argument of counsel for the Defendant, James R. Schwartz, and the Plaintiff, Ronald W. Erickson. The Court considered the pleadings filed in this action and the following evidence: Declaration of Jon Luedecker, Declaration of Dean Wilson, the Declaration of Christina Nyhus, and the Declaration of Ronald Erickson.

Based on the argument of counsel and the evidence the Court finds that there are no material facts in dispute regarding ownership of the property and that the Plaintiff is entitled to judgment as a matter of law.

BASED ON THE ABOVE FINDINGS, IT IS ORDERED:

1. DNR's motion for summary judgment is granted.

2. DNR's title to the property legally described on Exhibit A is established and quieted in DNR in fee simple, free and clear of Plaintiff's claim;

3. Plaintiff is forever barred from having or asserting any right, title, estate, lien, or interest in or to the property herein described adverse to DNR;

4. Plaintiff's remaining claims are dismissed with prejudice;

5. DNR is awarded statutory attorney fees in the amount of $125.00; and

6. The Clerk shall strike trial date.

Dated this 20th day of February, 2004.

/s/ J. Spector
Judge

Presented by:
CHRISTINE O. GREGOIR
Attorney General

Signature Dated: Feb. 20, 2004
James R. Schwartz
WSHA no. 20168
Assistant Attorney General
(360) 586-3551

Signature Dated: 2-20-04
Cheryl A. Nielson
WSHA no. 20163
Assistant Attorney General
(360) 586-3551

Attorneys for Defendant
Department of Natural Resources

APPENDIX F

STATE OF WASHINGTON
JEFFERSON COUNTY SUPERIOR COURT

RONALD W. ERICKSON, a single person, d/b/a RxR DEPOT & RAILROAD CO.

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES; OLYMPIC EAGLE, INC.; WARREN L. STETSON TRUST,

Defendants.

No.03-2-00213-4
ORDER Of DISMISSAL OF TIMBER CLAIM

Date of Hearing:
December 12, 2003
Judge/Department:
The Honorable Thomas J. Majhan
Nature of Motion:
Dismissal

This matter came before the Court on the defendant State of Washington, Department of Natural Resources' motion for an order dismissing the timber trespass claim because the Court lacked jurisdiction over the claim. The Court heard the oral argument of plaintiff Ronald W. Erickson and counsel for defendant Cheryl A. Nielson, Assistant Attorney General. The Court considered the

pleadings filed in this action and the Declaration of James Smego.

///

///

Based on the argument of counsel and the evidence presented, the Court finds:

1. The plaintiff's action includes a claim for timber trespass which is an action in tort.

2. The plaintiff has not pled that he filed nor has he filed a tort claim with the Office of Risk Management, as required by RCW 4.92.100 and RCW 4.92.110 before the filing of an action for damages against the state arising out of tortious conduct.

3. The Court has no jurisdiction over the timber trespass claim.

Based on the above findings, It Is Ordered:

1. Defendant's motion is granted.

2. The timber trespass claim is dismissed with prejudice for lack of jurisdiction.

Dated this 12th day of December, 2003.

/s/ Thomas J. Majhan
THOMAS J. MAJHAN, Superior Court Judge

Presented by:

CHRISTINE O. GREGOIR
Attorney General

Signature Dated: 12-12-03
James R. Schwartz
WSHA no. 32236
Assistant Attorney General
(360) 586-3551

Signature Dated: 12-12-03
Cheryl A. Nielson
WSHA no. 32236
Assistant Attorney General
(360) 586-3551
Attorneys for Defendant
Department of Natural Resources

APPENDIX G

UNITED STATES CONSTITUTION

U.S. CONST. Art. 1 § 8, cl. 3 (Commerce Clause)

The Congress shall have power . . . ; To regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes; . . . .

U.S. CONST. art. I § 8, cl. 4 (Uniform Bankruptcy Laws)

The Congress shall have power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the United States; . . . .

U.S. CONST. art. 6 § 2. (Supremacy Clause)

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. CONST. amend. XIV, § 1 (Due Process & Equal Protection)

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

U. S. STATUTES AT LARGE

13 Stat. 365 (1864) at 370, 372

(An Act Granting Lands . . . by the Northern Route. [Northern Pacific Railroad]).

Sec. 11. *And be it further enacted,* That said Northern Pacific Railroad , or any part thereof, shall be a post route and a military road, subject to the use of the United States, for postal, military, naval, and all other governmental service, ...

Sec 20. *And be it further enacted,* That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in the time of war) the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend or repeal this Act.

25 Stat. 180 (1889) at 676

(Enabling Act)

AN ACT to provide for the division of Dakota into two States and to enable the people of North Dakota, South

Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled . . . .

SEC. 2. . . . SEC. 3. . . . SEC. 4. . . . SEC. 5. . . .
SEC. 6. . . . SEC. 7. . . . SEC. 8. . . . SEC. 9. . . .

SEC. 10. That upon the admission of each of said States into the Union sections number sixteen and thirty-six in every township of said proposed States . . . Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, **nor shall any lands** (emphasis added) embraced in Indian, military, or **other reservations of any character** (emphasis added) be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

Sec 11. That all lands here in granted for educational purposes shall be disposed of only at public sale . . . .

(Approved February 22, 1889.) [25 U.S. Statutes at Large ch. 180 p 676.]

APPENDIX I

UNITED STATES CODE

11 U.S.C. § 554 (1986) Abandonment of property of the estate.

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) . . . .

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

11 U.S.C. § 1174 (1978) Liquidation.

On request of a party in interest and after notice and a hearing, the court may, or, if a plan has not been confirmed under section 1173 of this title before five years after the date of the order for relief, the court shall, order the trustee to cease the debtor's operation and to collect and reduce to money all of the property of the estate in the same manner as

if the case were a case under chapter 7 of this title.

28 U.S.C. § 1257 (1988) State courts; certiorari.

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

45 U.S.C. §§ 903, 904 (1979)

(Full text deleted for printing).

45 U.S.C. § 915(d) (1983) Authority of bankruptcy court.

The authority of the bankruptcy court to authorize abandonments, sales, and transfers of lines of the Milwaukee Railroad shall be governed by the provisions of section 904 of this title, rather than the provisions of this section.

49 U.S.C. § 22301 (1993) Light density rail line pilot projects.

(a) GRANTS. -- The Secretary of Transportation may make grants to States that have State rail plans described in section 22102(1) and (2), to fund pilot projects that demonstrate the relationship of light density railroad services to the statutory responsibilities of the Secretary, including those under title 23.

(b) LIMITATIONS. -- Grants under this section may be made only for pilot projects for making capital improvements to, and rehabilitating, publicly and privately owned rail lines structures, and may not be used for providing operating assistance.

(c) PARIVATE OWNER CONTRIBUTIONS. -- Grants made under this section for projects on privately owned rail line structures shall include contributions by the owner of the rail line structures, based on the benefit to those structures, as determined by the Secretary.

(d) STUDY. -- The Secretary shall conduct a study of the pilot projects carried out with grant assistance under this section to determine the public interest benefits associated with the light density railroad networks in the States and their contribution to a multimodal transportation system. Not later than March 31, 2003, the Secretary shall report to Congress any recommendations the Secretary considers

appropriate regarding the eligibility of light density rail networks for Federal infrastructure financing.

(e) AUTHORIZATION OF APPROPRIATIONS. -- There are authorized to be appropriated to the Secretary to carry out this section $17,500,000 for each of the fiscal years 1998, 1999, 2000, 2001, 2002, and 2003. Such funds shall remain available until expended.

(Added Pub. L. 105-178, title VII, § 7202(a), June 9, 1998, 112 Stat. 470.)

APPENDIX J

Transportation Equity Act for the 21st Century

(A Summary Overview)

On June 9, 1998, the President signed into law PL 105-178, the Transportation Equity Act for the 21st Century (TEA-21) authorizing highway, highway safety, transit and other surface transportation programs for the next six years. Subsequent technical corrections in the TEA 21 Restoration Act have been incorporated; thus, the material presented here reflects the combined effects of both Acts and the two are jointly referred to as TEA-21.

TEA-21 builds on the initiatives established in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), which was the last major authorizing legislation for surface transportation. This new Act combines the continuation and improvement of current programs with new initiatives to meet the challenges of improving safety as traffic continues to increase at record levels, protecting and enhancing communities and the natural environment as we provide transportation, and advancing America's economic growth and competitiveness domestically and internationally through efficient and flexible transportation.

Significant features of TEA-21 include:

- Assurance of a guaranteed level of Federal funds for

surface transportation through FY 2003. The annual floor for highway funding is keyed to receipts of the Highway Account of the Highway Trust Fund (HTF). Transit funding is guaranteed at a selected fixed amount. All highway user taxes are extended at the same rates [as] when the legislation was enacted.

- Extension of the Disadvantaged Business Enterprises (DBE) program, providing a flexible national 10 percent goal for the participation of disadvantaged business enterprises, including small firms owned and controlled by women and minorities, in highway and transit contracting undertaken with Federal funding.

- Strengthening of safety programs across the Department of Transportation (DOT). . . . These new incentive funds also offer added flexibility to States since the grants can be used for any Title 23 U.S.C. activity.

- Continuation of the proven and effective program structure established for highways and transit under the landmark ISTEA legislation. Flexibility in the use of funds, emphasis on measures to improve the environment, focus on a strong planning process as the foundation of good transportation decisions—all ISTEA hallmarks—are continued and enhanced by TEA-21. New programs . . . target special areas of national interest and concern.

- Investing in research and its application to maximize the

performance of the transportation system. Special emphasis is placed on deployment of Intelligent Transportation Systems to help improve operations and management of transportation systems and vehicle safety.

Rail Programs

Magnetic Levitation Transportation Technology Deployment Program (MAGLEV)

Contract authority totaling $60,000,000 is authorized for FYs 1999-2001 to fund nationally significant projects that will demonstrate the feasibility and safety of transportation systems employing magnetic levitation. Of this amount, $15,000,000 will be set aside for discretionary grants for the research and development of low-speed superconductivity MAGLEV technology for public transportation in urban areas. An additional $950 million in budget authority is authorized, but must first be appropriated by Congress. STB and Congestion Mitigation and Air Quality funding may also be used. After soliciting applications for eligible projects from the States, the Secretary will select one or more projects to receive assistance for preconstruction planning activities. Upon completion of preconstruction planning activities for all selected projects, the Secretary will select one project to receive financial assistance for final design, engineering, and construction activities.

APPENDIX K

REVISED CODE OF WASHINGTON

WASH. REV. CODE § 4.04.010 (1891) Extent to which common law prevails

The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and conditions of society in this state, shall be the rule of decision in all the courts of this state.

[1891 c 17 § 1; Code 1881 § 1; 1877 p 3 § 1; 1862 p 83 § 1; RRS § 143. Formally RCW 1.12.030.]

WASH. REV. CODE § 79.36.500 (2003) Railroad right of way - Certificate

Upon full payment of the appraised value of any right of way for a railroad and of damages to state lands affected, the department shall issue to the railroad company applying for such right of way a certificate in such form as the department may prescribe, in which the terms and conditions of said easement shall be set forth and the lands covered thereby described, and any future grant, or lease, by the state, of the lands crossed or affected by such right of way shall be subject to the easement described in the certificate.

[2003 c 334 § 390, eff. July 27, 2003. 1927 c 255 § 91; RRS

§ 7797-91, Prior: 1915 c 147 § 14; 1901 c 173 § 7. Formally RCW 79.36.140, 79.01.364.]

WASH. REV. CODE § 81.36.040 (1961) Line or canal across or along watercourses

Every corporation formed under the laws of this state for the construction of railroads or canals shall possess the power to construct its railway or canal, as the case may be, across, along or upon any river, stream of water, watercourses, plank road, turnpike or canal, which the route of such railway or canal shall intersect or touch; but such corporation shall restore the river, stream, watercourse, plank road or turnpike thus intersected or touched to its former state as near as may be, and pay any damages caused by such construction: PROVIDED, ...

[1961 c 14 § 81.36.040. Prior: 1895 c 80 § 4; 1888 p 64 § 3; RR § 10536.]

APPENDIX L

WASHINGTON STATE LAWS

1901 Wash. Laws 173

Laws of 1901
Chapter CLXXIII [173] p. 353

Granting Rights-Of-Way To Railroad Companies Over State Land.

An act granting rights-of-way to railroad companies over the lands of the State of Washington, and providing for the appraisement and disposition of the lands included within and used for such rights-of-way, and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Section 1. That a right of way through over and across the public lands of the State of Washington, except tide lands, harbor areas and shore lands, is hereby granted to any railroad company duly organized under the laws of any state or by the Congress of the United States to any extent not exceeding fifty feet on each side of the center line of said railroad now constructed or hereafter to be constructed. In order to obtain the benefits of this grant as to any railroad hereafter to be constructed, the company constructing or proposing to construct such **road** [emphasis added]shall file with the Board of State Land Commissioners a copy of its

articles of incorporation, due proofs of organization thereunder [sic.], a map or maps accompanied by the field notes or the survey to the state as hereinafter provided the amount of the appraised value of said lands affected by, used for or included within said right-of-way. In order to obtain the benefits of this grant as to any railroad **now constructed the company owning such road** [emphasis added] shall file with the Board of State Land Commissioners a list of the lands affected by, used for or included within such right-of-way, and shall pay to the state as hereinafter provided the amount of the appraised value of said lands affected by, used for or included within said right-of-way.

Sec. 2. That all lands of this state over which a right-of-way of any railroad company may now or hereafter be located shall be classified and appraised as hereinafter provided, and the State Board of Land Commissioners shall constitute and serve as the board of appraisers mentioned in section 2 of article XVI of the constitution of this state.

Sec 3. That upon the filing of said list or maps by said company as herein provided, said Board of State Land Commissioners are [sic] hereby authorized and directed to ascertain and classify the lands affected by, to be used for and included within the aforesaid right-of-way, and shall thereupon fix the price per acre for each lot or block, quarter section and subdivision thereof, less the improvements, if any, so affected by, used for and included within said right-

of-way, which price shall be the full market value thereof but not to be less than ten dollars per acre.

Sec. 4. That should any improvements made as of right and with license from the State of Washington be upon any of such lands at the time of said appraisement, the state board shall separately appraise the same together with the damage and waste done to said lands by the use and occupancy of the same or to adjacent lands and after deducting from the amount of the appraisement for improvements the amount of such damage and waste the balance shall be determined and regarded as the value of said improvements, and the railroad company if not the owner of such improvements shall deposit with the State Treasurer through the Commissioner of Public Lands the value of the same as [shown] by said appraisement within thirty days next following the date thereof. That where said right-of-way affects the improvements of any person other than [the person] owning said improvements or entitled thereto under existing law, the applicant for said right-of-way shall file with the Commissioner of Public Lands a valid release of damages duly executed by such person or persons, or a certified copy of a judgment of a court of competent jurisdiction showing that the damages resulting to such person or persons, ascertained in accordanee [accordance] with existing law, has been made or paid into the registry of such court.

Sec. 5. When said appraisement is made it shall be recorded in the proceedings of said Board of State Land Commissioners and the evidence or report upon which the same is based shall be preserved of record in the office of the Board of State Land Commissioners and the Commissioner of Public Lands shall prepare a certificate of said appraisement in duplicate, one of which he shall file in his office and the other transmit to the auditor of the county in which the lands affected by said rights-of-way is situate shall be forthwith served with notice of appraisement. A copy of said appraisement shall be forthwith filed with the board of county commissioners of any county in which the land is situate[d].

Sec. 6. Within thirty days after the appraisement of said lands, as aforesaid, the board of county commissioners of any county is which the right-of-way is situated, or any person, company or corporation may appeal from the same to the Superior Court of the county in which the right-of-way affected by the appeal is situate[d], but if the applicant is the party appealing, he or it must deposit the amount of the appraisement in the registry of the court to which the appeal is taken. All appeals shall be heard and determined by the court *de novo*. The taking of an appeal shall not prevent the use of the land affected thereby for right-of-way purposes during the prosecution of the appeal. All costs on appeal shall be paid by the applicant.

Sec. 7. That upon full payment of the value of such easements ascertained as aforesaid, **any future grant** [emphasis added] or lease by the state of the lands affected by said right of way **shall be subject to the easements** [emphasis added] obtained under the provisions of this act.

Sec. 8. Nothing contained in this act shall be deemed to in any way conflict with any existing law of this state relating to the method by which railroad companies may acquire rights of way. No pending condemnation proceeding nor right claimed therein shall be affected in any way by the provisions of this act.

Sec. 9. An emergency exists and this act shall take effect immediately.

Passed the Senate March 12, 1901.
Passed the House March 14, 1901.
Approved by the Governor March 18, 1901.

APPENDIX M

COURT RULES

Fed. R. Civ. P. § 52 (a) (1995).

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .

Fed. R. Bankr. P. § 3007 (1991). Objections to Claims.

An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.

Bankr. N. D. Ill. LBR Rule 3007-1 (1978). CLAIMS-OBJECTIONS*
(a) Objection.

(1) An objection to the allowance of a claim shall identify

the claimant by name and clerk's docket number and shall include the following:

(A) Notice that if the claimant fails to timely file a written response that:

(i) the court may rule on the pleadings filed without oral argument and without further notice to the claimant; and

(ii) that the claimant will be deemed to have consented to such a determination by the court in accordance with LBR 3007 (b)(2) (B);

(b) Response

(2) no Response Filed.

(B) Failure by the claimant to file a response shall be deemed as consent to have the court consider and determine the issue on the pleadings without oral argument.

* Although this is found to be the wording of the local rules for other bankruptcy courts it is not substantiated at time of printing to be the exact wording of the 1987 Ill. BANKR. CT.

APPENDIX N

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN THE MATTER OF
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Debtor.

In Proceedings for the Reorganization of a Railroad
No. 77 B 8999
Prentice H. Marshall, Judge

ORDER NO. 866

Final Decree

Upon consideration of the Trustee's Motion for Entry of a Final Decree, filed pursuant to the Trustee's Modified 1898 Plan of Reorganization (the "Plan"), due notice having been given to creditors, stockholders and other parties in interest, the Court, acting as a Court of Reorganization for the Debtor pursuant to Section 77 of the Bankruptcy Act of 1989, as amended ("Section 77"), finds and concludes as follows:

1.... 2.... 3.... 4.... 5.... 6.... 7.... 8.... 9....

NOW, THEEFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1.... 2.... 3.... 4.... 5....

6. On the Consummation Date all right, title and interest of the Trustee in the property of the Estate shall vest in and become the absolute property of the Reorganized Company, notwithstanding the laws of any state or the decision or order of any state authority to the contrary. Except as otherwise provided in this Order or in the Plan, the Reorganized Company shall take the property free and clear of all claims, rights, demands, interests, liens and encumbrances of every kind and character. The Trustee is authorized and directed to execute and deliver to the Reorganized Company a deed and a bill of sale transferring all of the property of the Estate. The form of those instruments shall be determined by the Trustee. All property and funds of the Estate held by persons other than the Trustee shall be delivered or paid over to the Reorganized Company, except (i) the Segregated Account and (ii) escrow accounts pertaining to Tax Benefit Transfer Leases which run in favor of the lessor.

7.... 8.... 9.... 10.... 11.... 12.... 13.... 14....

Dated: November 12, 1985.

Enter:
/s/ Prentice H. Marshall
District Judge

(Seal of U.S. District Court and declaration deleted for printing)

APPENDIX O

Erickson v. DNR
Some Brief References To Bankruptcy Laws

Clerk Papers

Chicago Bankruptcy Court's Final Decree (CP 54), (APP. N-41).

Opening Brief for Appellate Court

Erickson cited the bankruptcy chain of title (OB 4).

Erickson claimed that "The order of the bankruptcy court was to transfer all property to the company emerging from the reorganization (CP 47-54). DNR's improper inferences is that Erickson's rr rs/w [railroad rights of way] were sold and not transferred to the trustee of the bankruptcy court." (OB 8). Erickson argued a case on point, Paige v. Schenectady R. Co., 178 N.Y. 102, 70 N.E. 213 (1904) where a rail service went into foreclosure. The rail line was declared abandoned by the city counsel yet later sold and declared unauthorized abandonment and reversed (OB 11). Erickson argued similarity as his ". . . rail rights . . . survived bankruptcy; and property was transferred after a presumed abandonment." (OB 11, 12).

Erickson had cited the esteemed Honorable Judge Story saying, ". . . abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear (Charles 36 U.S. at 420, app. Q-18)." (OB 24).

Response Brief for DNR

DNR again affirmed that Chicago sold RR [railroad] to Olympic Eagle, Inc. and Warren L. Stetson Trust, and they sold to Erickson (RB-D 4, 11). DNR argued, "Chicago's failure to acquire the interconnecting rights of ways combined with the construction of a nearby highway is compelling evidence of Chicago's intent to abandon its right to create a rail corridor over these DNR easement many decades ago" (RB-D 9). DNR also asserted that, "Chicago could abandon such easements when it no longer intended to use the easements for the stated purpose, since the federal court had already approved the disposition" (RB-D 27). "The DNR easements had been abandoned by Chicago [when] put up for auction due to non-payment of taxes . . . indicating that abandonment had occurred (C.P. 117)" (RB-D 29-30).

Reply Brief for Erickson

Erickson referred to Chicago's prior bankruptcies in 1912, 1927, and 1945 (RB 22). Also that the bankruptcy assigned Chicago's interests to "CMC Real Estate Corp. who sold RR [railroad] property" (RB 12).

Erickson argued that, "Pre-bankruptcy abandonment claims are not valid after bankruptcy as all property and franchises survive a bankruptcy (Detroit 184 U.S. at 395, app r-29), and is subject only to the people or court (Paige 70 N.E. at 217, OB at 12, Northern 35 L.Ed 1097, app r-30).

This is true of the Milwaukee bankruptcy (CP at 54, app r-31)." (RB 14).

"The federal court transferred RR rs/w [railroad rights of way] ownerships in the 1912, 1927, and 1945 bankruptcies (CP 22, 23 denied by Resp CP 31). The court authorized the disposition of RR [railroad] assets under section 77 of the Bankruptcy Act (CP 113), and the 1985 Final Decree of Milwaukee's bankruptcy vested all its property to the new **"reorganized company, notwithstanding the laws of any state or the decision or order of any state authority to the contrary"** (EA, CP 54). ABAN[ONMENT] must harmonize with federal laws (RCW 4.04.010). The RR rs/w [railroad rights of way] are **not** abandoned (SB at 27)" (RB 22).

WASHINGTON STATE SUPREME COURT

Petition for Review

Erickson asserted that, "the complication is that Erickson's easements were NOT acquired by a 'threat of condemnation' but created by state statute using the word 'road' and an 'exclusive clause;' AND declared an asset and sold by a federal court." (PR 7). Erickson also said:

> The federal government did not give to any state court the right to dissolve corporate assets. By federal preemption the ICC and reorganized court have EXCLUSIVE authority to dispose of rail service and PROPERTY they determine as railroad assets, CP at 54, Matter of Boston and

> Maine Corp. C.A.1 (Mass) 1070, 506 R.2d 2 (1979) at 5. Here the state of New Hampshire attempted to keep a railroad service and property the ICC and reorganized court authorized abandonment. The court found they should have settled title ownership questions in reorganized proceedings, Matter at 7. The state lacked authority and was too late to reverse the federal action. (PR 7).

The implication was that DNR was too late to assert abandonment after the court declared such assets and sold such. "Federal law preempts the state court findings, Matter at 5." (PR 12).

DNR's Response to Petition for Review

DNR asserted that no "decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or . . . significant question of law under the Constitution of the State of Washington or of the United States is involved." (RB-PR 6). DNR also asserted that "The trial court, however, ruled that Chicago had abandoned its rights under the various easements before DNR took any actions." (RB-PR 8). DNR stated that "Chicago was free to sell its assets as authorized by the bankruptcy court. Had the railroad right-of-way been a fee asset, Olympic Eagle would have acquired the fee. The right-of-way, however, was only an abandoned easement. As a result, Olympic Eagle acquired nothing by the quitclaim deed (case omitted). There is no constitutional issue here." (PR-D 10).

APPENDIX P

Chicago Milwaukee Railroad Rights of Way Through State Lands.

State DNR Record's Dept.

Item #	Certificate #	Section	Township	Range	Acres	County
# 1.	# 78	36	21	4	6.055 Acres	King
# 2.	87	30	23	9 E	7.18A	King
# 3.	88	16	22	10 E	12.39A	King
4.	89	36	23	8 E	14.20A	King
5.	90	16	22	6 E	6.52A	King
6.	91	36	24	41 E	7.34A	Spokane
7.	92	36	16	23 E	12.46A	Douglas
8.	93	16	17	35 E	9.18A	Adams
9.	94	36	16	24	12.12 2/9/1909	Douglas
10.	97	38	17	29 E	0.54A	Canceled

11.	105	16	18	38 E	11.58A
Canceled					
12.	106	36	17	32 E	4.18A
Canceled					
13.	107	16	17	20 E	15.84A
Canceled					
14.	108	16	17	33 E	11.98A
Canceled					
15.	109	16	17	30 E	14.00A*
Douglas					
16.	113	30	16	25 E	11.78A
Douglas					
17.	114	36	16	25	6.77A
Douglas					
18.	116	36	18	36 E	0.34A
Adams					
19.	117	16	17	31 E	12.60A
Adams					
20.	118	16	37	16	10.29
Adams					
21.	125	16	17	20 E	15.84A
Canceled					
22.	126	36	17	29 E	.54
Douglas					
23.	127	16	18	38 E	11.58A
Canceled					
24.	128	16	17	35 E	11.98A
Canceled					

25. Whitman	131	36	20	44 E	2.70A
26. Adams	147	16	17	34 E	12.15A
27. Douglas	148	6	15	27	12.6A
28. Whitman	156	16	20	45 E	0.18A
29. Spokane	157	36	21	45 E	19.98A
30. Douglas	158	4	16	27 E	14.30A
31. King	159	14	22	7 E	7.07A
32. King	166	16	22	7 E	8.91A
33. Kittitas	167	36	21	12 E	7.50A
34. Kittitas	176	16	17	20 E	15.29A
35. Douglas	179	36	16	26 E	6.59A
36. Douglas	186	36	16	24 E	18.80A
37. Adams	193	16	18	38 E	13.44A

38. 194 16 17 33 E 2.60A
Adams

39. 208 29 29 13 W 4.93A
Clallam

40. 219 16 17 23 E 12.80A
Kittitas

41. 226 16 27 12 W 26.82A
Jefferson

42. 235 3 27 13 W 0.55A
Jefferson
included 2 27 13 W 9.94A
Jefferson

43. 236 28 27 12 W 7.96A
Jefferson

44. 237 33 28 13 W 3.31A
Clallam

45. 238 34 28 13 W 4.56A
Clallam

46. 239 27 27 12 W 10.49A
Jefferson

47. 240 21 27 12 W 19.76A
Jefferson

48. 243 36 18 11 W 10.64A
Grays Harbor

49. 245 36 18 11 W 10.64A
Canceled

50. 250 36 18 18 E 0.03A
Kittitas (within Ellensburg City Limits)

51. Chehalis	251	36	20	11 W	11.88A
52. Clallam	252	16	30	14 W	12.74A
53.? Adams	254	16	20	33 E	6.09A
54. Snohomish	261	16	29	5 E	0.73A
55. Thurston	262	14	16	3 W	0.869A
56. Adams	263	16	20	31 E	6.11A
57. Adams	264	16	20	34 E	15.64A
58. Benton	265	16	13	27 E	13.56A
59. Grant	272	36	13	27 E	18.17A
60. Spokane	274	16	20	30 E	0.16A
61. King	279	36	23	8 E	11.81A
62. Benton	280	6	13	26 E	2.42A
63. Benton	281	12	13	24E	12.22A

64. 282 10 13 25 E 12.93A
Benton

65. 289 26 14 26 E 6.63A
Benton

66. 290 8 13 25 E 11.96A
Benton

67. 291 30 14 27 E 5.83A
Benton

68. 292 ? 16 17 21 2.45
Kittitas

69. 294 ? 36 17 22 0.11
Kittitas

70. 295 16 20 35 E 18.03A
Adams

71. 308 30 18 36 E 2.10A
Adams

72. 324 16 29 5 E 0.73A
Snohomish

73. 325 6 13 26 E 13.40A
Benton

74. 328 22 2 27 E 16.565A
King

75. 336 36 20 14 E 13.67A
Kittitas

Total Acquisitions: 75 TOTAL ACRES 713 (about)
(about 27 acres to the linear mile)

APPENDIX Q

Federal Railroad Rights of Way Through State Lands List (incomplete)

(Northern Pacific & Great Northern)
State DNR Record's Dept.

County	#	Buyer	Section	Twsp	Range	Acres	Date
King	1	NPRC	36	22	4 E	2.53	3/26/02
"	"	"	36	21	4 E	/	
Whatcom	11	NPRC	26	20	12	1.64	
Chehalis	12	NPRC	36	18	11	9.76	
Chehalis	13	NPRC	36	32	5	4.43	
Snohomish	14	NPRC	24	32	9	6.39	
Pierce	32	NPRC	36	19	5	6.73	
Thurston	34	NPRC	3	16	16	.57	
Pacific	35	NPRC	16	13	8 W	5.54	
King	36	NPRC	16	24	5 E	2.36+3.08	
King	38	NPRC	16	24	6	2.5	
Grant	38	NPRC	1	16	24	/	
King	39	NPRC	16	21	5	8.99	
King	42	NPRC	10	25	4	11.34	
Chehalis	43	NPRC	7	36	18	8.13	

Whitman	44 NPRC	16	14	45	8.40	
Whitman	45 NPRC	36	20	43	14.54	
Whitman	47 NPRC	16	25	29	9.69	
Lincoln	49 NPRC	16	26	33	13.20	
King	50 NPRC	36	23	7	12.63	
Spokane	53 NPRC	16	21	43	15.40	
Spokane -	55 NPRC	16	22	43	10.54	
Whatcom	58 NPRC	36	37	3 E	1.36	
Franklin	61NPRC	36	13	30	10.20	
Chehalis	65 NPRC	36	20	12	11.55	
Snohomish	82 NPRC	16	30	10	/ 8/23/1906	
Snohimish	83 NPRC	16	30	8	/ 8/23/1906	
Snohomish	84 NPRC	36	30	10	/ 8/23/1906	
Whitman	85 NPRC	16	19	44 E	/ 8/23/1906	
Lincoln	119 NPRC	36	25	45	13.79	
Chelalis	121 NPRC	16	18	5	11.94	
Okanogan	136 WGNRC	9	31	25	40.01 4/23/1908	
Okanogan	137 WGNRC	9	30	25	20.67 4/23/1908	
Okanogan	138 WGNRC	7	30	25	12.23 4/23/1908	

Okanogan	139	WGNRC	8	30	25	7.69 4/23/1908
Okanogan	140	WGNRC	34	31	25	13.19 4/23/1908
Okanogan	141	WGNRC	27	31	25	7.73 4/23/1908
Douglas	142	WGNRC	17	27	26	14.56 4/23/1908
Douglas	143	WGNRC	36	28	26	5.6 4/23/1908
Stevens	145	WGNRC	16	37	37	9.464/23/1908
Douglas	146	WGNRC	20	27	26	6.37 4/23/1908
Douglas	163	WA&GN	36	28	26	8.91 10/9/1908
Douglas	164	GNRC	35	28	26	7.5 10/9/1908
Douglas	172	W&GNRC	26	27	25	10.03 10/7/1908
Douglas	175	W&GN	19	27	26	12.65 10/8/1908
Ferry	177	W&GN	36	39	33	/ 10/9/1908
Ferry	178	W&GN	36	39	36	15.86 10/9/1908
Douglas	181	GNRC	24	27	25	5.20 10/9/1908
Douglas	182	GNRC	25	27	25	9.78 10/9/1908
Douglas	183	W&GN	17	27	26	8.42 10/9/1908
Douglas	185	W&GN	36	25	42	5.32 10/9/1908
Okanogan	196	GN	16	40	28	18.91 3/15/1909
Walla Walla	210	NPRC	13	7	36	5.57 7/30/1909
Douglas	212	GNRC	25	27	25	1.12 7/30/1909

Douglas	218 GN		4	28	28	21.43 7/30/1909
Ferry	224 GNR		36	39	36	6.55 2/2/1909
Douglas	244 GN	Canceled	9	27	26	6.41 4/4/1910
Lincoln	255 GNRC		36	22	31	1.27 6/18/1910
Cowlitz	256 GN&CRRC		20	8	2	5.09 6/23/1910
Lewis	303 NPRC		16	12	2	3.45
Okanogan	305 GNRC		36	29	23	5.0 9/28/1912
Lincoln	311 GN		16	26	36	7.62 3/20/1913
Chelan	321 GN		16	27	23	6.58 9/2/1914
Okanogan	326 GN		34	31	25	6.85 2/4/1915
Yakima	337 NPRC		16	13	18	2/14/16
Chelan	338 GNRC		16	26	21	2/15/16
Snohomish	339 NPR		36	30	10?	8/23/1916
Walla Walla	340 NPR		16	19	33	14.79 3/13/1916

Stopped here:

Total Acquisitions: 67 Total Acreage: 543 (about)

APPENDIX R

Abbreviations For Public Railroad Rights of Way

Through Washington State lands

(Companies Alphabetical by Co. Abbreviation.)

BB&BCR	Bellingham Bay & British Columbia Railroad.
BB&ERC	Bellingham Bay & Eastern Railway Co.
BBT	**Big Bend Transit**
C&CRC	Chehalis & Cowlitz Railroad Co.
CA&SRC	Coeur d'Alene & Spokane Railway Co.
CCRC	The Clarke County Railway Co.
CM&PRC	Chicago, Milwaukee & Pacific Railroad Co.
CM&PSRC	Chicago, Milwaukee & Puget Sound Ry. Co.
CM&SPRC	Chicago, Milwaukee & St. Paul Railway Co.
CNRC	Connell Northern Railway Co.
CVRC	Columbia Valley Railway Co.
E&CVT	**Everett & Cheney Valley Traction**
GH&CRRC	Grays Harbor & Columbia River Railway Co.
GH&PSRC	Grays Harbor & Puget Sound Railway Co.
GN&CRRC	Great Northern & Columbia River Ry. Co.
GNRC	Great Northern Railway Co.
HSC	The Hercules Sandstone Co.
I&WRC	Idaho & Western Railway Co.
KNRC	Kennewick Northern Railway Co.
M&ARC	Marysville & Arlington Railway Co.

M&RLC	**Merrill & Ring Lumber Co.**
MCRC	The Mill Creek Railroad Co.
MTRC	Milwaukee Terminal Railroad Co.
NARC	New Aukum Railroad Co.
NCRC	North Coast Railroad Co.
NCTC	Northern Coast Timber Co.
NPRC	Northern Pacific Railway Co.
NY&VRC	North Yakima & Valley Railway Co.
O&WRC	Oregon & Washington Railroad Co.
OR&NC	The Oregon Railroad & Navigation Co.
OTRC	Olympia Terminal Railway Co.
OWR&NC	Oregon, Washington Ry. & Navigation Co.
P&SRC	Portland & Seattle Railway Co.
PLC	**Polson Logging Co.**
PS&CRC	Puget Sound & Cascade Railway Co.
PS&WHRC	Puget Sound & Willapa Harbor Railway Co.
PV&YRC	Portland, Vancouver & Yakima Railway Co.
RLC	**Robbins Logging Co.**
S&BCRC	Spokane & British Columbia Railway Co.
S&ERC	Spokane & Inland Empire Railway Co.
S&IRC	Spokane & Inland Railway Co.
S&LLRC	Springdale & Long Lake Railway Co.
S&MRC	Seattle & Montana Railroad Co.
SF&NRC	Spokane Falls & Northern Railway Co.
SIRC	Spokane International Railroad Co.
SLR&TC	Silver Lake Railway & Timber Co.

SP&SRC	Spokane, Portland & Seattle Railway Co.
SPA&LCR	Seattle, Port Angeles & Lake Crescent Ry. Co.
SPM&MRC	St. Paul, Minneapolis & Manitoba Ry. Co.
SR&TC	Seattle Railway & Timber Co.
SVL&WC	**Spokane Valley Land & Water Co.**
T&ERC	Tacoma & Eastern Railway Co.
TERC	Tacoma Eastern Railway Co.
W&GNRC	Washington & Great Northern Railway Co.
WCC	Wilson Coal Co.
WCRC	Washington Central Railway Co.
WCRRC	Washington & Columbia River Railway Co.
WERC	Washington Electric Railway Co.
WRC	Waterville Railway Co.
WTC	**Weyerhaeuser Timber Co.**
YP&SRC	Yakima, Portland & Seattle Railway Co.

APPENDIX S

State Public Railroad Rights of Way List (incomplete)

State DNR Dep't. of Records

County	#	Buyer	Section	Twsp	Range	Acres	Date
King	1	NPRC	36	22	4 E	2.53	3/26/02
"	"	"	36	21	4 E	/	
Clark	2	PV&YRC	36	4	3 E	12.44	
Clark	3	PV&YRC	36	4	2 E	14.02	
Stevens	4	SF&NRC	16	40	41	12.32	
Stevens	5	SF&NRC	36	33	39	.83	
Stevens	6	SF&NRC	36	36	38	3.22	
Stevens	7	SF&NRC	36	37	37	3.64	
Skamania	8	CVRC	16	1	5	12.71	
Skamanish	9	BB&ERC	16	27	4	13.10	
Whatcom	10	BB&BCR	16	40	5	3.94	
Whatcom	11	NPRC	26	20	12	1.64	
Chehalis	12	NPRC	36	18	11	9.76	
Chehalis	13	NPRC	36	32	5	4.43	
Snohomish	14	NPRC	24	32	9	6.39	
Snohomish	15	OR&NC	36	18	40	14.09	

. . .(#16-337 deleted for printing, also found in MOCD)

Yakima	337	NPRC	16	13	18		2/14/16
Chelan	338	GNRC	16	26	21		2/15/16
Snohomish	339	NPR	36	30	10?		8/23/1916
Walla Walla	340	NPR	16	19	33	14.79	3/13/1916
Lewis	343	WERC	36	13	1 W		7/6/1916

APPENDIX T
CHICAGO LETTERS 1975-1978

LETTER 1

Chicago, Milwaukee, St. Paul and Pacific Railroad Co.
Law Department
Room 815 Skinner Building, 1326 Fifth Avenue
Seattle, Washington 98101 - Phone (206) 628-3645

James E. Nelson
Western Counsel
J. Fred Simpson
Dennis G. Opachki
David H. Boyd
General Attorneys

June 18, 1975

Bert L. Cole
Commissioner of Public Lands
State of Washington
Department of Natural Resources
Olympia, WA 98501

Re: Appropriation of Railroad Right of Way -
Jefferson County - Illegal State Action

Dear Commissioner Cole:

The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road) has received a so-called order (copy attached) from the Department of Natural Resources bearing your signature dated April 18, 1975, which purports to appropriate certain property and rights therein which are owned by this railroad.

The Milwaukee purchased this property at its full fair market value several years ago. Acquisition of this property was in the years 1909 through 1910. Since that time the Milwaukee has continued to pay locally assessed taxes on this property. The acquisition of this property was pursuant to the terms of the Laws of 1901, Ch. 173, @1, p. 353 , et seq., as amended by Laws of 1907, Ch. 104, @1, et seq. There was[sic] no terms, condition or proviso in these statutes or in the respective instruments written thereunder which permitted forfeiture by reason of non-use. Accordingly, the Milwaukee has a perpetual easement in the property described in your order and is free to develop the same for railroad purposes in accordance with the demands of business.

Your order purporting to cancel certain right of way owned by the Milwaukee is based upon a statute (RCW 79.01.336) enacted in 1927. This statute does not apply to the railroad rights of way, and certainly by no stretch of the Constitution **[Bert L. Cole, Commissioner Page Two - - June 18, 1975]** can it be used for divestiture of property rights acquired and held prior to its effective date. The action contemplated by your order of April 18, 1975, contravenes several sections of the Washington and United States Constitutions. In addition, I note that, procedurally, you are required to procure a judicial determination authorizing appropriation of private property and pay just

compensation before appropriating such property under the constitutions. And, of course, the state is required to provide such notice and hearing in this regard as will satisfy the fundamental requirements of procedural due process of law, also guaranteed by the constitutions. None of these procedural requirements have been satisfied, nor is there any substantive authority for your action.

The order issued by your department constitutes illegal state action and results in considerable damage and injustice to the Milwaukee. Therefore, it is demanded that you vacate your order in timely fashion before further damages occur.

May I be timely advised of your intentions in this matter.

Very truly yours,

/s/ David H. Boyd

David H. Boyd

General Attorney

DHB:jsk
enc.
cc.: Mr. W. H. Ploeger
Mr. Q. W. Torpin
Mr. R. G. Sackerson
Mr. P. W. Scott

LETTER 2

Chicago, Milwaukee, St. Paul and Pacific Railroad Co.

Law Department
Room 815 Skinner Building, 1326 Fifth Avenue

Seattle, Washington 98101 - Phone (206) 628-3645

James E. Nelson
Western Counsel
J. Fred Simpson
Dennis G. Opachki
David H. Boyd
General Attorneys

December 10, 1975

Bert L. Cole
Commissioner of Public Lands
State of Washington
Department of Natural Resources
Olympia, WA 98501

Attention: Walt Carlson

Re: Appropriation of Railroad Right of Way -
Clallam County - State of Washington
Law Dept. File: GF 2204

Dear Mr. Carlson:

I have reviewed your letter of October 22, 1975, and reviewed your statements therein. (1) that RCW 79.01.336 contains the same language (forfeiture for two years non-use) its predecessors did as far back as 1895 and (2) that this statute applies to railroads.

I have reviewed my earlier research on this subject to verify the position of my earlier letter.

The 1895 version of RCW 79.01.336 did not contain a provision requiring forfeiture for a two-year period of non-use. Nor did the 1897 version of RCW 79.01.336 contain

such a provision. As you will recall, the Milwaukee acquired the subject right of way during the years 1909-1910, hence there was no statute in effect at the time of purchase requiring or providing for forfeiture. The first statute which treats the forfeiture for non-use idea is the 1915 version of RCW 79.01.336. This version was, of course, enacted after the Milwaukee's purchase, and specifies that the certificate of right of way must contain the forfeiture provision before the same is effective.

The 1895, 1897, 1915 and 1921 versions of RCW 79.01.336 specifically dealt with the right of ways for logging--not railroads. Further, the 1915 and 1921 version specifically distinguish railroad rights of way from such rights of way as are covered by those statutes.

The Railroad rights of way in this case were granted under Laws of 1901, ch. 173, @1-9, p. 23 as amended by Laws of 1907, ch. 104, @1. p. 201. The statutes are the preceding version of RCW 79.01.344. These enactments do not deal with logging rights of way, but with railroad rights of way. There is no provision for forfeiture of railroad right of way, through non-use, that I have found. Nor do the certificates granting right of way to the Milwaukee contain such a provision. Accordingly, it appears reasonable to

assume that the Milwaukee has, at least, a permanent easement in this land which it may develop according to the dictates of its business.

As I stated in my earlier letter of June, 1975, the state cannot divest the Milwaukee of its property right by simply sending out an ex parte order, as the constitutions require much more in terms of procedural due process. Further, as you know, the federal and state constitutions require that private property owners be compensated where their property is taken or damaged for public use.

In order that this matter may be more speedily resolved, I ask that you send me a copy of the (informal) attorney general's opinion to which you refer so that I can determine the legal basis for your position and advise my client accordingly. During the interim, I will advise the Milwaukee that the order purporting to cancel right of way issued under Commissioner Cole's signature is illegal and therefore a nullity and of no legal consequence.

Very truly yours,
/s/ David H. Boyd
David H. Boyd
General Attorney

DHB:jsk

LETTER

Chicago, Milwaukee, St. Paul and Pacific Railroad Co.

Law Department
Room 815 Skinner Building, 1326 Fifth Avenue
Seattle, Washington 98101 - Phone (206) 628-3645

[Attorney's names deleted for printing]

July 18, 1978

Mr. Dave Bateman
Assistant Attorney General
Department of Natural Resources
State of Washington
Olympia, Washington 98504

Dear Mr. Bateman:

After speaking with you on several occasions on the telephone, I have taken another look at our file pertaining to the intents of the State of Washington to deprive the Railroad of certain parcels of Railroad right of way in Clallam County on the basis of abandonment. It does not seem to me that this is the type of situation where the Railroad could lose its rights by abandonment. In addition, it is not the intention of the Railroad to abandon that property.

Sincerely,

/s/ Dennis G. Opacki
Dennis G. Opacki
General Attorney
DGO:an:2-5

APPENDIX U

DNR DEPARTMENT ORDER

78 204

STATE OF WASHINGTON
DEPARTMENT OF NATURAL RESOURCES
Bert L. Cole, Commission of Public Lands

Chicago, Milwaukee
& Puget Sound Railway Company
Skinner Building
1326 5th Avenue
Seattle, Washington 98101

ORDER

It is ordered that Commissioner's Order 75-144, canceling the Railroad Right of Way easements, conveyed under Application Nos. 6837, 6838, 6839, be rescinded; and

Reinstate those portions of Railroad Rights of Way over and across the SW1/4NE 1/4, NE1/4NW1/4 of Section 29, Township 28 North, Range 13 West, W. M., under Application No. 6837; Lot 6 of Section 33, Township 28 North, Range 13 West, W.M., under Application No. 6838; and the SW1/4SW1/4 of Section 34, Township 28 North, Range 13 West, W.M., under Application No. 6839 canceled by said Commissioner's Order 75-144.

JUSTIFICATION

A Notice of Intent has been given by the Railway

Company that the above-referenced railroad rights of way have not been abandoned.

Dated this 7th day of August, A.D. 1978.

State of Washington
Department of Natural Resources

by /s/ Bert L. Cole
Bert L. Cole
Commissioner of Public Lands

App. Nos. 6837, 6838, 6839
[Login Stamp deleted for printing]

VOL 528 page 187

APPENDIX V

The Attorney's Pocket Dictionary

ABCDEFGHIJKLMNOPQRSTUVWXYZX

Search **abandonment**

abandonment absconding, debtor,
NEXT PAGE

Voluntary relinquishment of property or a right by the owner or holder, with the intention of terminating ownership and without vesting ownership in another person. Abandonment is composed of two elements, an intention to relinquish the right or property without intending to transfer title to any particular person and the external act by which such intention is carried into effect, both elements must concur. See Roebuch v. Macosta County Road Commission, 229 N.W.2d 343, 5 Mich. App. 128. Abandonment has acquired technical and statutory meanings in various statutes such as "child abandonment", "Abandonment of easement", "abandonment of husband or wife."

<Prev. Word Next Word> <Prev. Page Next Page

Please send your comments to landlord@netcom.ca

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SUPREME COURT, U.S.

No. 06-495

In The
Supreme Court of the United States
OCTOBER TERM 2006

RONALD W. ERICKSON,
d/b/a RXR RAILROAD & DEPOT CO.
Petitioner,

v.

WASHINGTON STATE
DEPARTMENT OF NATURAL RESOURCES
Respondent.

On Petition for Writ of Certiorari to the Washington State Court of Appeals Division II
Applied For: June 6, 2006
Denied: Nov. 27, 2006

PETITION FOR REHEARING
(corrected)

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QUESTIONS

Is the application of abandonment's "cessation of purpose/ use" doctrine on railroad property sold by a bankruptcy court a violation of the federal Supremacy Clause; Due Process; the Commerce Clause; the legislated intentions in congressional bankruptcy and transportation laws; or common law's 1881 "shifting public use" doctrine?

Underlying questions contained therein are:

1. Is abandonment law only applied to railroads that are only easements and nothing more? And

2. Does abandonment's "automatic reversion" apply to undeveloped rail rights vested with other possible public uses? And

3. Does the payment of property or excise taxes prove intent to not abandon rail property? And.

4. In Washington is a sale of railroad rights of way to a timber company an acceptable practice to not bring abandonment? And

5. Is the application of abandonment law on undeveloped rail property a violation of common law's shifting public use doctrine? And

6. Is applying WASH. REV. CODE § 81.36.070 (1961) to railroad sales vested prior to 1961 unconstitutional?

PARTIES TO PROCEEDING

There are no other Petitioners in this proceeding. RXR Railroad & Depot Company is individually owned by Ronald W. Erickson.

There are no additional Respondents other than the Washington State Department of Natural Resources.

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JURISDICTION

A. FEDERAL JURISDICTION

This Court has jurisdiction under SUP. CT. R. 44.2, when "other substantial grounds" are presented.

B. ISSUES RAISED IN STATE COURTS [1]

Respondent raised the significance of tax payments (CP 117, OB 22, UO 5, WC App D). Attached is the Petition for Review to the State Supreme Court (App. J).

ADDITIONAL CONSTITUTION AND STATUTES

43 U.S.C. § 912, WASH. REV. CODE § 34.05.010, WASH. REV. CODE § 81.36.070, 1909 WASH. LAWS 196 § 2.

STATEMENT OF FACTS NOT CITED IN CERT.

In 1989 CMC began to not pay taxes (CP 31 @ 3.13).

On Nov. 10, 1992 the Jefferson County Treasurer announced a tax auction to sell Rail Property (CP 118-20).

On Nov. 17, 1992 Dean Wilson wrote Jefferson County stating that CMC "by ceasing to pay property taxes on the easements, the DNR is terminating the following easements" (App. D, H affirming Wilson's affidavit CP 117).

On Nov. 23, 1992 DNR wrote Jefferson County Treasurer requesting "that the county withdraw[s] these parcels from your tax foreclosure sale" (CP 120).

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[1]Abbreviations: **Chicago** – Chicago, Milwaukee, St. Paul & Pacific R.R. Co., et al; **CMC** - CMC Real Estate Corp. as assigned trustee of the BANKR. CT.; **CP** - Clerk Papers; **DNR** - WA State Dep't of Natural Res.; **OB** - Corrected Opening Brief to State Court of Appeals; **OE** - Olympic Eagle, Inc. & Warren L. Stetson Trust; **RB** - Petitioner's Reply Brief to State Court of Appeals; **Rail Property** - Petitioner's railroad rights of way; **SPUD** - Shifting Public Use Doctrine; **WC** – Cert. Erickson v. DNR; misc.: (*) - L.Ed. pg. #; (~) - estimated pg. #.

On Sept. 2, 1993 OE acquired Rail Property from CMC "subject to general real estate taxes which are a lien but not yet delinquent" (CP 113, *see* App. I).

On Aug. 11, 1998 Petitioner acquired from OE the Rail Property "subject to general real estate taxes" (CP 90).

On Sept 28, 1999 Jefferson County Prosecuting Attorney wrote Petitioner saying, "county returned the money you paid in taxes on this land. . . ." (CP 131, App. E).

The Rail Property was not developed (CP 31 & 117).

ARGUMENT

In the past This Court has reheard cases when: 1) substantial doubt is evident;[2] 2) to examine single clauses in opinions[3] as are the involuntary actions cited to prove abandonment (UO 5, 6); 3) to review questions "left open."[4] and 4) to protect contracts.[5] Petitioner argued a constructive interpretation of the legislated granting instrument's use of the word "road" to include other vested public uses of the Rail Property. The court overlooking an interpretation thereof came as a surprise and the public deserves it to be heard.[6] The lower court's finding of abandonment is not lawfully supported by the evidence cited.

A. ABANDONMENT APPLICATION ON PROPERTY WHERE TAXES ARE PAID IS A VIOLATION OF

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[2] *Reid v. Covert*, 351 U.S. 487, 487 & 491 (1956).

[3] *Flora v. United States*, 362 U.S. 145, 167 (1960) ("focused almost exclusively upon a single clause in the prior opinion").

[4] *Silver King Co. v. Conkling Co.*, 256 U.S. 18, 25 (1921).

[5] *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. (16 How.) 416, 429 (1853) (quote at fn # 47).

[6] *Herndon v. Georgia*, 295 U.S. 441, 455 (1935) (argument shut out).

ABANDONMENT THEORY.

CMC began to not pay taxes in 1989 (CP 31). The Rail Property was withdrawn from the tax foreclosure sale in 1992 (CP 120). Tax obligations on Rail Property were not delinquent -when sold by CMC in 1993 (CP 113). Consequently the Rail Property was NOT sold to avoid foreclosure as the lower court opinion claimed (UO 5). Petitioner's tax payments were refunded (CP 131, App. E).

Case law argues strongly that tax payments on rail property defer abandonment (OB 21, 22, 35, RB 12).[7] If the lower court had examined more closely the facts they may not have listed a "sale to avoid foreclosure" as evidence.

B. ABANDONMENT APPLIED TO PETITIONER'S UN-DEVELOPED RAIL RIGHTS IS UNCONSTITUTIONAL

1. Circumventing Writs of Mandamus is Unconstitutional.

Railroad rights of way are contracts.[8] Petitioner's Rail Property was vested at time of original acquisition.[9]

The lower court cited that, "Chicago failed to acquire rights over other intervening private lands. . . . necessary to link up the easements into a rail corridor" as evidence of abandonment (UO 5). W*rits of mandamus are* proper to enforce contracts (OB 5, 15, RB 6, 14) but are restricted to

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[7]*Martell v. Stewart,* 628 P.2d 1069, 1071 (1981) citing *People v. S. Pac. Co.*, 158 P. 177, 180 (1916); *Maier v. The Dalles & S. R.R. Co.* 90 P.2d 782, 787 (1939) (foreclosure settlement not abandonment).

[8]*W. W. Cargill Co. v. Minn. ex rel. R.R. & Warehouse Commission,* 180 U.S. 452, 469 (1900) ("is a public highway . . . acquired by the railroad company under an inviolable contract with the state. . . .").

[9]*Columbia Valley R.R. Co. v. Portland & S. Ry. Co.*, 94 P. 918, 919 (1908) ("determining its rights under its contract of purchase. . . .").

the terms of the grant and must be both "remunerative" and "clearly" required.[10] Forcing service "to require extension of existing lines beyond the scope of a carrier's commitment to the public service is a taking of property in violation of the federal constitution."[11] Petitioner's Rail Property had no construction or reversion clauses (1901 WASH. LAWS 173, OB all, WC App. 34). Washington courts had previously found that an "implied obligation to construct within a reasonable time" was heard and found inadequate.[12] Lower courts' citing failures to acquire property not enforced by a *writ of mandamus* as evidence of abandonment must stop.

This Court has found perpetual, unlimited easements to be grants "in fee"[13] (OB 14).). This Court has said of grants, "intention of the testator prevails over the legal interpretation of the words" (OB 18) and that a state's vested intent must prevail on undeveloped rail properties.[14]

2. Railroad Abandonment Presumes a Use (RB 8).[15]

Rail abandonment is after rail use and after an ICC, STB[16] or state agency[17] has granted abandonment of service.

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[10] *N. Pac. R.R. Co. v. Terr. of Wash.*, 142 U.S. 492, 1095 & 98 (1892).
[11] *ICC v. Oregon-Wash. R.R. & Nav. Co.*, 228 U.S. 14, 41 (1932).
[12] *Neth. Am. Mortg. Bank v. E. R.R. & L. Co.*, 252 P. 916, ~ 918 (1927).
[13] *Detroit v. Detroit Citizens St. Ry. Co.*, 184 U.S. 368, 394 (1902) ("is not, by its terms, limited and revocable, the grant is in fee. . . .").
[14] *Charles River Bridge v. Warren Bridge*, 36 U.S. (1 Pet.) 420, 547 (1837) ("abandonment ought not to be presumed . . . purpose of the state to abandon it does not appear."); *Charles* 36 U.S. at 583i.
[15] *Who entitled to land upon its abandonment for railroad purposes . . . less than fee simple absolute* 136 A.L.R. 296 (1942) (" 'abandonment,' has . . . been . . . once actually in use for railroad purposes").
[16] *Nat'l Wildlife Feed's v. I.C.C.*, 850 F.2d 694, 703 (D.C. Cir. 1988).
[17] *Schnabel v. County of DuPage*, 428 N.E.2d 671, 673 (2d Dist. 1981)

The doctrine of "cessation of use" also presumes a use.[18]

The lower court listed the building of Highway 101 as evidence of abandonment (UO 6). Abandonment must be only by easement holder's actions and not "involuntary."[19]

The doctrine of railroad nonuse presumes a prior use. Respondent's cases cited had prior rail use.[20] Nonuse does yield to any future uses (OB 7).[21] OE's selling title insured future rail use thereof.[22] Rail interests are honored first when "doubts" of abandonment are present (RB 9).[23] The doctrine of nonuse[24] was intended to be applied only to rail grants: 1) "acquired by eminent domain,"[25] or 2) that had performance

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Lacy v. E. Broad Top R.R. & Coal Co., 77 A.2d 706, 708 (1951).

[18]*Nicomen Boom Co. v. N. Shore Boom & Driving Co.*, 82 P. 412, 416 (1905) ("shall 'cease' . . . does not apply . . . not yet used").

[19]3 *Kent, Comm.* 448, p 551 (1851); *Neth. Am. Mortg. Bank v. E. R.R. & L. Co.*, 252 P. 916, ~ 919 (1927) ("non-user, intention to abandon and damage to the owner . . . must concur. . . ."); *Ocean Shores R.R. Co. v. Spring Valley Water Co.*, 262 P. 53, 55 (1927) ("The intention to abandon is . . . acts of the owner only . . . ."); *Ill. Cent. R.R. Co v. Ill. Commerce Comm'n*, 75 N.E.2d 23, 26 (1947) ("involuntary act").

[20]*Schnabel* 428 N.E.2d at 673; *Brewer and Taylor Co. v. Wall*, 769 S.W.2d 753, 754 (1989); *Cannco Const. Co. v. Livington* 669 S.W.2d 457, 459 (1984).

[21]*Sandy River Coal Co. v. Champion Bridge Co.* 48 S.W.2d 1062, 1064 (1932) ("intends to use in the future. . . ."); *Neitzel v. Spokane Int'l R.R. Co.*, 141 P. 186, 190 (1914) ("may anticipate future needs"); *Nicomen*, 82 P. at 415 ("anticipate future necessities. . . ."; *McAdam v Benson Logging & Lumber. Co.* 107 P. 187, 188 (1910) ("Nor will mere nonuser defeat the right . . . when no time has been stipulated for the use. . . ."); *Spokane v. Merrian*, 141 P. 358, 363 (1914) ("reason-able necessity, not an absolute necessity. . . ."; *Commencement and duration* . . . . 154 A.L.R. 7 (1945) ("no rule of law 'prohibiting . . . to take effect . . . in the future.' ".

[22]*Ocean Shores* 262 P. at 55 ("The intention to abandon is . . . to be inferred from . . . its dealings with relation to its title.").

[23]*Marthens v. B & O R.R. Co.*, 289 S.E.2d 706, 713 (1982).

[24]*Nat'l Wildlife Fed'n v. I.C.C.*, 850 F.2d 694, 703 (D.C. Dir. 1988).

[25]*Lacy v. E. Broad Top R.R. & Coal Co.*, 77 A.2d 7 06, 708 (1951);

requirements,[26] not 3) legislated grants similar to Congressional grants that are exempt from abandonment.[27] Nonuse requires other causes to impair development and "destroy the use.[28] Abandonment in part only abandons part.[29]

C. RAILROADS TRADITIONALLY ALLOWED PUBLIC ROAD AND "SPUD" USES.

The law is clear that abandonment doctrines ONLY apply to railroad rights of way that are considered ONLY an easement and nothing more (OB 13).[30] The lower court said the legislature granted only an easement and nothing more (UO 7) and that "it was not intended to be a public highway" (UO 7). This Court has asserted railroads to be a "public highway."[31] This Court has also found that "[c]onsiderations

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Nicomen, 82 P. at 416 (Code applies to lands "acquired by eminent domain.").

[26] *McAdam v. Benson Logging Etc. Co.*, 107 P. 187, 187 (1910) ("Nor will mere nonuser defeat the right to occupy a right of way for purposes expressed in a grant, when no time has been stipulated").

[27] *Barney v. Burlington N. R.R. Co.*, 490 N.W.2d 726, 730 (S.D. 1992) cert. denied; *Puett v. W. Pac. R.R.*, 752 P.2d 213, 217 (1988).

[28] *Nicomen* 82 P. at 416 (1905); *Schnabel v. County of DuPage*, 428 N.E.2d 671, 676 (2d Dist. 1981) ("non-use is accompanied by acts . . . intention to abandon and . . . destroy . . . easement. . . .").

[29] *Abrocrombie v. Simmons*, 81 P. 208, 209 & 210 (1905) ("an abandonment of a portion of the right of way operates to vest that portion in the owner of the adjoining land.").

[30] *Penn Cent. Corp. v. U.S. R.R.. Vest Corp.*, 955 F.2d 1158, 1159 (7th Cir. Ind. 1992) citing: *Nat'l Wildlife Fed'n v. ICC*, 850 F.2d 694, 702 (D.D. Cir. 1988); *Middlesboro Town & Land Co. v. Louisville & N. R.R. Co.*, 120 S.W.2d 394, 396 (1938); *Roeder Co. v. Burlington N. R.R. Inc.*, 716 P.2d 855, 859 (1986) ("nothing more"); *Scott v. Wallitner*, 299 P.2d 204, 206 (1956).

[31] Railroads, 2004 DIGEST OF UNITED STATES SUPREME COURT REPORTS LAWER'S EDITION, Vol. 11-A §2 at 425 citing: *Olcott v. Supervisors*, 83 U.S. 678, *384 (1873); *Lake Superior & Miss. R.R. Co. v. U.S.*, 93 U.S. (3 Otto) 442 *967 (1877); *Smyth v. Ames*, 169 U.S. 466, 544(1898); *W. W. Cargill Co. v. Minn. ex rel. R.R. & Warehouse*

of the interests of the public are held to be controlling . . . as a railroad comes . . . under the domination of the court.[32]

In 1922 the Congressional "committee was called to the fact that in some cases highways have been established on abandoned rights-of-way (OB 30, 33)."[33] Road use is sometimes permitted on railroads.[34] Some states abrogated railroads as public roads.[35] Washington did not but declared such highways.[36] The lower court disagreed saying that the Rail Property "was not intended to be a public highway. . . ." (UO 9). The word "road" described the Rail Property.[37]

E. L. Pierce wrote describing the SPUD,

> When property has been taken for a public use, and full compensation made for the fee or a perpetual easement, its subsequent appropriation to

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Comm'n, 180 U.S. 452, 469 (1900); *Lawson v. State*, 107 Wn.2d 444, 467 (1986) ("railroads as public highways . . . justifies protecting . . . for public transportation use.") citing *State v. Dept. of Natural Res.* 329 N.W.2d 543 (1979) *cert. denied* 463 U.S. 1209 (1983).

[32] *Joy v. City of St. Louis*, 138 U.S. 1, *858 (1890), *Spokane v. WA & Great N. Ry. Co.*, 219 U.S. 166, 173 (1911) ("forfeiture must be asserted be judicial proceedings authorized by law.").

[33] *Barney v. Burlington N. R.R. Co.*, 490 N.W.2d 726, 730 (S.D. 1992) cert. denied ("easement granted by Congress . . . is not a common law easement."); 43 USC § 912 (1922).

[34] *Williams v. Atl. Coast Line R.R. Co*, 17 F.2d 17, 19 (4th Cir. 1927) (paving public road on railroad not abandonment); *State* 329 N.W.2d at 547 ("settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired. . . ."); *Chew v. Commonwealth*, 161 A.2d 621, 624 (1960) (R.R. converted to bus service); *Crescent Twp. v. Pittsburg & L. E. R.R. Co.*, 59 A. 1103, 1104 (1904) ("travelers and vehicles used it thereafter as a road," and "not sufficient evidence to show abandonment. . . .").

[35] *Lake Superior* 93 U.S. At *966 and *969 ("railroads were originally declared public highways, the right of the public to use them has been expressly abrogated; as in Massachusetts. . . .").

[36] *Puget Sound Elec. Ry. v. R.R. Comm'n*, 117 P. 739, (1911).

[37] 1909 WASH. LAW 173.

> another public use – certainly if one of a like kind – does not require further compensation to the owner (case footnote). Nor is such compensation required where there is a change in the person or body enjoying and controlling the property taken, or in the conditions upon which the public may use it.[38]

Such was the vested public use of the Rail Property to allow public uses and private ownerships thereof. The lack of a lower courts' interpretation of the word "road" came as a surprise to Petitioner and deserves to be heard[39] (OB 27- 44).

D. THE SALE OF RAIL PROPERTY TO TIMBER CORPORATIONS IS LAWFUL.

Rail conveyances to "non railroad" owners are not always abandonment.[40] The Kansas Supreme Court asked,

> Was the interest which the railroad company acquired by the deed one which it could convey to plaintiff? The general rule is that, in the absence of charter or statutory restrictions, corporations may take, hold, and convey land for any purpose not inconsistent with those of which they were created.[41] (App. 35)

Evidence citing a corporation's affidavit to "absolve itself of a public duty" claiming no intent to use property for rail purposes (UO 6) is unethical (OB 11).[42] Actions speak.

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[38]Edward L. Pierce, A TREATISE ON THE LAW OF RAILROADS 233 (Little, Brown & Co. 1881) (1881).

[39]*Herndon v. Georgia,* 295 U.S. 441, 455 (1935).

[40]*Burnier v. Dep't of Envtl. Res.*, 611 A.2d 1366, 1368 (1992).

[41]*Abercrombie v. Simmons*, 81 P. 208, 210 (1905).

[42]*Paige v. Schenectady Ry. Co.*, 70 N.E. 213, 217 (1904) ("attempts to absolve itself from its obligations without the consent of the state, is void . . . is void as against public policy (cases omitted).").

The lower court also discounted the pre-1961 vested rights under WASH. REV. CODE § 81.36.070 (1961) that authorized railroads to be sold to non-railroad entities [43] (OB 22, RB 7, UO 6, App. B). The lower court said such "was inapplicable" (UO 6). Modified statutes may not be given retroactive effect if such may interfere with vested rights.[44]

Washington courts established the Rail Property as vested in 1909 as land purchased [45] and

> This court has repeatedly decided that if a contract when made was valid under the Constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the Legislature or the judiciary will be regarded by this court as establishing its invalidity. [46]

Historically timber corporations did use railroads to log (OB 21). DNR sold identical rail rights to such (App. C). Washington laws also historically made no distinction between public and private rail use on city streets. Petitioner owns an assignment from CMC for any "demands whatsoever" that includes pre-abandonment damages (App.

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[43] WASH. REV. CODE § 81.36.070 (1961); 1909 WASH. LAW 196 § 2; 1961 WASH LAW 12 @ 81.36.070.

[44] *Havemeyer v. Iowa City*, 70 U.S. 294, *39 (1865) (" new decisions of our Supreme Court are . . . to be rejected because they destroy vested rights"), citing *Lynch v. U.S.* 292 U.S. 571, 39* (1934).

[45] *Columbia Valley R.R. Co. v. Portland & S. Ry. Co.*, 94 P. 918, 919 (1908) ("it described the land purchased by metes and bounds. . . .").

[46] *Olcott v. Supervisors of Fond Du Lac County*, 83 U.S. (16 Wall.) 678, *383 & *386 (1872) citing *Havemeyer* 70 U.S. at *39; *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. (16 How.) 416, 431 (1853); *See Gelpeke v. Dubuque*, 68 U.S. 221, 222 (1863) (contract validity).

F). The time of abandonment must be determined without the inappropriate evidences cited by the lower court. Petitioner acquired his State rail contracts under a general statute and appeals to this Court to perform its duty and protect his contract.[47] "What more "can Petitioner do."[48]

CONCLUSION

For the reasons set forth above, as well as those in Petitioner's writ of certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

Ronald W. Erickson *pro se*
934 W. Lauridsen Blvd. # 209
Port Angeles, WA 98363.
(360) 457-552

CERTIFICATE OF COUNSEL

I, Ronald W. Erickson, acting as counsel in my own behalf, do hereby certify that this petition for rehearing of a writ of certiorari is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

[47] *Ohio* 57 U.S. at 429 ("When a contract is made, . . . it shall not be impaired, and makes it the duty of this court to carry it into execution that duty must be performed.").

[48] *Saunders v. Shaw*, 244 U.S. 317, 320 (1917).

APPENDIX A
UNITED STATES CODE

---

43 U.S.C. § 912 (1922) Disposition of abandoned or forfeited railroad grants

Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right , title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm or corporation, assigns, or successors in title and interest to whom . . . . Provided, That this section shall not affect . . . nor shall this section affect any public highway on said right of way on March 8, 1922. . . .

(Mar. 8, 1922, c. 94, 42 Stat. 414.)

APPENDIX B
LAWS OF WASHINGTON

WASH. REV. CODE § 34.05.010 (1997) Definitions

Definitions set forth in this section shall apply throughout this chapter, unless the context clearly requires otherwise.

(3) "Agency action" means licensing, the implementation or enforcement of a statute, the adoption or **application of an agency rule or order** (emphasis added), the imposition of sanctions, or the granting or withholding of benefits.

Agency action does not include . . . (c) any sale, lease, contract, or other proprietary decision in the management of public lands . . . .

[1997 c 136 § 2; 1992 c 44 § 10; 1989 c 175 § 1; 1988 c 288 § 101; 1982 c 10 § 5. Prior: 1981 c 324 § 1; 1981 c 183 § 1; 1967 c 237 § 1; 1959 c 234 § 1. Formerly RCW 34.04.010.]

WASH. REV. CODE § 81.36.070 (1961) Purchase, Lease, Sale, Merger Of Railroads

Any railroad company now or hereafter incorporated pursuant to the laws of this state or of the United States, or of any state or territory of the United States, may at any time

by means of subscription to the capital stock of any other railroad company or by the purchase of its stock or bonds, or by guaranteeing its bonds or otherwise, aid such company in the construction of its railroad within or without this state; and any such company owning or operating a railroad within or without this state, may extend the same into this or any other state or territory, and may build, buy, or lease the whole or any part of any other railroad, together with the franchises, powers and immunities and all other property and appurtenances appertaining thereto, whether located within or without this state; or may consolidate with any railroads or railroads in such other state or territory or with any other railroad in this state and may operate the same and may own such real estate and other property in such other state or territory as may be necessary or convenient in the operation of such road; and any such railroad company may sell or lease the whole or any part of its railroad and branches, within or without this state, constructed or to be constructed together with all property, rights, privileges, and franchises appertaining thereto, to, **-f-r-o-m-** -o-r- -w-i-t-h- **(cross out and emphasis added)** any railroad company organized or existing pursuant to the laws of the United States or of this state, or of any other state or territory of the United States; . . .

(Laws 1961, ch. 14 § 1.36.070)

prior: Laws of 1909 c 196 sec 2 p 701)

1909 WASH. LAWS 196

[H.B.119] RELATING TO RAILROADS. An Act relating to railroad companies; authorizing them to construct railroads and branches, and to sell, purchase, leases and consolidate with certain other railroads, and validating such sales, purchases, leases and consolidations heretofore made, and declaring an emergency.

Section 2

Any sale or purchase of and any consolidation by sale, or otherwise, or any lease, or agreement to sell, consolidate with or lease, the whole or any part of any railroad, or the branch lines of any company whether organized or located within or without this state, with the franchises appertaining thereto, **to, from or with** (emphasis added) any railroad company organized under the laws of the United States or of this state or any other state or territory or any consolidation between such companies heretofore executed by the proper officers of the respective companies parties to such sale lease or consolidation or contract is hereby legalized and made in all respects valid and binding from the date of its execution: Provided, That the provisions of this section shall not apply when the railroads or transportation corporations involved are competing lines.

APPENDIX C
1903-1910 TRANSIT & LOGGING USE
of Public Railroad Rights of Way Through State Lands

BBT	Big Bend Transit		
		# 160	Aug. 25, 1908
E&CVT	Everett & Cheney Valley Traction		
		# 207	July 16, 1909
RLC	Robbins Logging Co.		
		# 51	Feb. 8, 1904
SR&TC	Seattle Railway & Timber Co.		
		#197	(relinquished 1909)
SR&TC	Silver Lake Railway & Timber Co.		
		# 230	Feb. 16, 1910
SVL&WC	Spokane Valley Land & Water Co.		
		# 120	March 13, 1907
WCC	Wilson Coal Co.		
		#80	Dec. 8, 1915
WTC	Weyerhaeuser Timber Co.		
		# 41	Nov. 4, 1903

APPENDIX D
'92 DNR LETTER TO JEFFERSON COUNTY

(Emblem Deleted for printing)

Washington State Department of
Natural Resources

Brian Boyle
Commissioner of Public Lands

November 17, 1992

Olympic Region Office
Route 1, Box 1375
Forks, WA 98331
(206) 374-6131

Kathy Graham
Jefferson County Treasurer's Office
P.O. Box 571
Port Townsend, WA 98368

Re: Your letter dated November 10, 1992, concerning foreclosure sales on R/R easements to CMC Heartland.

Dear Ms. Graham:

Since neither the grantee or it's successors have ever used the right of way for the granted purpose and have demonstrated a lack of interest in doing so in the future by ceasing to pay property taxes on the easements, the DNR is terminating the following easements granted on various dates in 1909 to the Chicago, Milwaukee & Puget Sound Railway Company:

N., R. 12 W.

Easement # 6835, located in the N1/2 NW1/4, SW1/4 NW1/4, N1/2 SW1/4, SE1/4 SW1/4, W1/2 SE1/4 SE1/4 SE1/4, Sec. 21, T. 27 N., R. 12 W..

Easement # 6836, located in the SW1/4 NW1/4, W1/2 SW1/4, Sec. 27, T. 27 N., R. 12 W.

Easement # 6646, located in the W1/2 NW1/4, SE1/4 NW1/4, Sec 2, T. 27 N., R. 13 W.

Easement # 6766, located in the NE1/4 NE1/4, Sec. 3, T. 27 N., R. 13 W.

Upon completion of the termination process, our Olympia office will contact your Auditor's Office. If you have any questions please call.

Sincerely,
/s/ D. Wilson
Dean Wilson
Lands Specialist
for: John Calhoun
Olympic Region Manager

cc: file No's 6834, 6835, 6836, 6646 & 6766

Equal Opportunity Affirmative Action Employer

APPENDIX E
1999 JEFFERSON PROSECUTOR'S LETTER
(C.P 131)

(County Courthouse Illustration)

385-0073

Prosecutors

Juelie Dalzell
Jefferson County Prosecuting Attorney
Courthouse – P.O. Box 1220
Port Townsend, Washington 98368
Telephone (360) 385-9180 FAX (360)
Jill Landes, Deputy Prosecutors
Michael Haas, Deputy Prosecutors
Theodore M. Cropley, Deputy
David W. Alvarex, Deputy Prosecutor

September 28, 1999

Mr. Ron Erickson
Freelance Poet
441 Elk Drive
Brinnon, WA 98320

Re: **Letter dated September 6, 1999 to Jack Westerman**

Dear Mr. Erickson;

Mr. Westerman of the Assessor's Office asked me to respond to your letter of September 6, 1999.

Mr. Westerman based on the advice of his attorney Paul McIlrath removed lands from a tax foreclosure sale. He had a right to do this based on his legal counsel's advice and did not need a court order.

Additionally, the County believes that because the Railway Company acquired its easements from the State of Washington in March of 1910 the land reverted back to the State when the easements were abandoned. Case law is fairly clear that railroad easement rights are extinguished and merged with the underlying fee ownership upon abandonment of the railroad. Roeder Co. v. Burlington Northern Inc., 105 Wn.2d 567,571, 716 P.2d 855, 859 (1986).

Since the State is the underlying fee owner of the land in question the county returned the money you paid in taxes on this land. It is our position that you hold no valid property interest in any portion of the old railroad right of ways and that is why you owed no taxes and the tax monies you did pay were refunded with interest.

Very truly yours,
/s/ Juelie
Juelie Dalzell
Prosecuting Attorney

APPENDIX F
2000 CMC RAILROAD ASSIGNMENT

439745
Page: 2 0f 2
12/20/2000 11:15
ASN 9.00

Jefferson County Excise Tax
Aff. No 091269
Date Paid 12/20/00
By c/c Treasure signature

After Recording Mail To:
Ron Erickson
441 Elk Dr.
Brinnon, Washington 98320

ASSIGNMENT

FOR VALUABLE CONSIDERATION, the receipt of which is hereby acknowledged, **CMC HEARTTLAND PARTNERS,** a Delaware partnership with an office at 330 North Jefferson Court, Suite 305, Chicago, Illinois 60661 (Successor to Richard B. Ogilvie, not as an individual but solely as Trustee of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, being in possession of all the assets and property of said Railroad Company under authority of the United States District Court for the Northern District of Illinois, Eastern Division, Docket no 77 B 8999 in proceedings under Section 77 of the Bankruptcy Act) ("Grantor"), hereby assign, convey and quit claim unto **RONALD W. ERICKSON,** a single man, as his

separate estate doing business in the State of Washington as "RXR Depot and Railroad Company," all right, title and interest, either actual or potential, for any claims arising out of or resulting or to result from the cutting and logging of timber on the real property of Assignor legally described as follows, together with the right to collect any sums of money, debts, accounts, interests, and demands whatsoever, as are now or shall hereafter become due, owing, or payable or belonging to Assignor, and have, use and take all lawful ways and means for the recovery thereof, together with the right in any and every way and manner to deal with said claims, choices of action, and rights of the Assignor hereby assigned.

ALL OF THE FORMER CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY'S 100 FOOT WIDE AND EXTRA WIDTH CORRIDOR LAYING in the SE1/2 SE1/4, SE1/4 NE1/4 AND NE`/4 NE1/4 OF SECTION 28, GOVERNMENT LOTS 4 AND 5 AND THE SW1/4 NW1/4 OF SECTION 27 AND IN THE SE1/4 SE1/4, SW1/4 SE1/4, SE1/4 SW1/4 NW1/4 NW1/4 OF SECTION 21 OF TOWNSHIP 27 NORTH, RANGE 12 WEST AND IN GOVERNMENT LOTS 1 OF SECTION 3 AND IN GOVERNMENT LOTS 4,5 AND 6, AND THE NE1/4 SW1/4 AND SW1/4 NW1/4 OF SECTION 2 OF TOWNSHIP 27 NORTH, RANGE 13 WEST, ALL BEING IN JEFFERSON COUNTY, WASHINGTON AND CONTAINING 49.11 ACRES, MORE OR LESS.

TOGETHER WITH any and all other claims, rights, or interests, heretofore arising out of the ownership of said real

property.

DATED this 10th day of November, 2000.

CMC HEARLAND PARTNERS,
a Delaware partnership
by; /s/ Edwin Jacobson

ATTEST:
/s/ Richard P. Brandstatter

439745
Page: 2 0f 2
12/20/2000 11:15
ASN 9.00

State of Illinois)
)SS
County of Cook)

On this date above noted, before me, the undersigned, a Notary Public in and for the county and state aforesaid, do hereby certify that **Edwin Jacobson,** personally known to me to be the **President** of CMC HEARTLAND PARTNERS, a Delaware general partnership, and **Richard P. Brandstatter,** personally known to me to be the **Secretary** of said general partnership, personally known to me to be the same person whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that as such **President** and **Secretary** of said general partnership, they executed the foregoing instrument pursuant to authority given by the Board of Directors of said general partnership as their free and voluntary act, and as the

free and voluntary act and deed of said general partnership for the uses and purposes therein set forth.

Given under my hand and seal this 10th day of November, 2000.

/s/ Patricia Johnson
Notary Public
My commission expires:2-19-2004

OFFICIAL SEAL
PATRICIA JOHNSON
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 02/19/04

APPENDIX G
2001 STATE ATTORNEY GENERAL LETTER

Christine O. Gregoire
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE, PO Box 40100, Olympia WA 98504-0100

March 9, 2001

Ron Erickson
441 Elk Dr.
Brinnon, WA 98320

Dear Mr. Erickson,

In your letter of February 28, 2001, you misunderstood a couple areas of the law. First the termination of the easement for abandonment did not have to comply with the terms of the Washington Administrative Procedures Act because such proprietary actions were specifically exempted from the act in 1988. See RCW 34.05.010 (3). Second, RCW 64.04.180 is not applicable to this case. That statute . . . . In this case DNR is and always has been the fee owner. Once the road was abandoned the rights belong to DNR as the underlying fee owner. . . Lastly, I am glad to hear that you may once again seek the advice of counsel, I look forward to discussing these matters with your new counsel.

Very truly yours,
/s/ James Schwartz
James Schwartz
Assistant Attorney General

cc: Rod Larson
Bruce Monell

APPENDIX H
1912 JEFFERSON COUNTY TAX ROLL

Real Property Assessment for Tax Roll Jefferson County State of Washington*

Year*...Name...	Lot...	Sec...	TWP...	Range...	Amount...	DatePaid
1912 Chicago	1	16	27	12W	$8.81	3-12-13
1912 Chicago	1	21	27	12W	13.08	3-12-13
1912 Chicago	1	28	27	12W	5.23	3-12-13
1912 Chicago	1	2	27	13W	1.65	1-12-13
1912 Chicago	1	3	27	13w	0.14	3-12-13

* (...) indicate data and columns deleted from record

APPENDIX I
1994 JEFFERSON COUNTY TAX ROLL

JEFFERSON COUNTY REAL PROPERTY
TAX ROLL

Tax Year 1994 Page 1883 / J-53
(misc. numbers deleted for printing) 712 211 000
Description S21 T27 R12W 19.76A
Tax 1

Taxpayer Olympic Eagle Inc
Warren L Stetson Trustee
PO Box 1212
Port Angeles WA 98362

Tax Status	Taxable
Tax Code	0601
Tax Districts	1-402H1L1
Gross Tax	33.62
SRCIT Exemption	0 .00
Net Real Tax	33.62
F/P Assessment	15.40
Total Due	49.02
1st Half Due	24.51
2nd Half Due	24.51

Delinqent [sic]

89	**none**
90	**none**
91	**none**
92	**none**
93	**none**

Classified R R R/W

JEFFERSON COUNTY REAL PROPERTY TAX ROLL

Tax Year 1994 Page 1886 / J-54
(misc. numbers deleted for printing) 712 272 000
Description S27 T27 R12W 10.49A
Tax 1

Taxpayer Olympic Eagle Inc
Warren L Stetson Trustee
PO Box 1212
Port Angeles WA 98362

Tax Status	Taxable
Tax Code	0601
Tax Districts	1-402H1L1
Gross Tax	17.86
SRCIT Exemption	0.00
Net Real Tax	17.86
F/P Assessment	15.40
Total Due	33.26
1st Half Due	16.63
2nd Half Due	16.63

Delinqent [sic]	89	**none**
	90	**none**
	91	**none**
	92	**none**
	93	**none**

Classified R R R/W

JEFFERSON COUNTY REAL PROPERTY
TAX ROLL

Tax Year 1994 Page 1887 / J-55
(misc. numbers deleted for printing) 712 283 000
Description S28 T27 R12W 7.96A
Tax 1

Taxpayer Olympic Eagle Inc
Warren L Stetson Trustee
PO Box 1212
Port Angeles WA 98362

Tax Status	Taxable
Tax Code	0601
Tax Districts	1-402H1L1
Gross Tax	13.56
SRCIT Exemption	0.00
Net Real Tax	13.56
F/P Assessment	15.40
Total Due	28.96
1st Half Due	28.96
2nd Half Due	0.00

Delinqent [sic]	89	**none**
	90	**none**
	91	**none**
	92	**none**
	93	**none**

Classified R R R/W

JEFFERSON COUNTY REAL PROPERTY TAX ROLL

Tax Year 1994 — Page unk. / J-56
(misc. numbers deleted for printing) 713 023 001
Description S2 T27 R13 — 9.96A
Tax 1

Taxpayer — Olympic Eagle Inc
Warren L Stetson Trustee
PO Box 1212
Port Angeles WA 98362

Tax Status	Taxable
Tax Code	0601
Tax Districts	1-402H1L1
Gross Tax	52.96
SRCIT Exemption	0..00
Net Real Tax	52.96
F/P Assessment	15.40
Total Due	68.36
1st Half Due	34.18
2nd Half Due	34.18

Delinqent [sic]

89	**none**
90	**none**
91	**none**
92	**none**
93	**none**

Classified — R R R/W

JEFFERSON COUNTY REAL PROPERTY
TAX ROLL

Tax Year 1994 Page 1904 / J-55
(misc. numbers deleted for printing) 713 031 000
Description S21 T27 R12W 0.55A
Tax 1

Taxpayer Olympic Eagle Inc
Warren L Stetson Trustee
PO Box 1212
Port Angeles WA 98362

Tax Status	Taxable
Tax Code	0601
Tax Districts	1-402H1L1

Gross Tax	3.52
SRCIT Exemption	0.00
Net Real Tax	3.52
F/P Assessment	15.40
Total Due	18.92

1st Half Due	18.92
2nd Half Due	0.00

Delinqent [sic]	89	**none**
	90	**none**
	91	**none**
	92	**none**
	93	**none**

Classified R R R/W

APPENDIX J
2005 PETITION FOR REVIEW to SUPREME COURT of WASHINGTON

Title Page, Table of Contents, Table of Authorities, Constitution Provisions, Statutes, Appendix
(Deleted for printing)

I. IDENTITY OF PETITIONER

Petitioner is Ronald W. Erickson. Erickson acted in his own behalf, *pro se*, as the Appellant below and the Plaintiff at trial. Erickson, as a sole proprietorship registered with the state of Washington as doing business as a railroad company under the name of "RxR Depot and Railroad Company" acquired this property. Erickson brought this action to protect his rail interests in accord with the laws of the state of Washington and RCW 81.36.040. Mr. Erickson's had some prior background specializing in cultural and linguistic interpretation of ancient biblical texts.

II. CITATION TO COURT OF APPEALS

Petitioner seeks review of Ronald W. Erickson, et al v. Department of Natural Resources, et al, ____ Wn. App. ___, ___P.3d ___ (2005), Washington State Court of Appeals, Division II, 2004 Term (No. 31569-6-II). The unpublished opinion was filed on May 10, 2005 affirming the trial courts summary judgment finding abandonment of Erickson's railroad easements over state lands. The Opinion is attached as Appendix A-1. The Court of Appeals' "Order

Denying Motion To Reconsider" was filed on June 22, 2005 and is attached as Appendix A-2.

A. DOES ABANDONMENT'S AUTOMATIC REVERSION TO FEE OWNER VIOLATE THE CONSTITUTION'S SEPAR-ATION OF POWERS WHEN APPLIED TO ERICKSON'S RAILROAD RIGHTS OF WAY THROUGH STATE LANDS?

B. DOES THE FEDERAL BANKRUPTCY COURT'S SALE OF RAILROAD PROPERTY TO OLYMPIC EAGLE FOR NON-RAILROAD PURPOSES VIOLATE THE STATE CONSTITUTION'S GUARANTEE THAT ANY PERSON OR CORPORATION MAY OWN CORPORATE RIGHTS EQUALLY, CONST. ART. 1 SEC. 12?

C. DOES THE GRANTING OF THIS ABANDONMENT VIOLATE THE CONSTITUTIONAL GUARANTEE THAT NO CORPORATION MAY SELL PROPERTY TO RELIEVE A FRANCHISE, CONST. ART. 12 SEC. 8?

Subsidiary to this question are the questions:

1. Is a legislated railroad right of way a franchise?

2. If such is not a franchise does abandonment violate due process protected by federal law and

Const. art. 1 sec. 3 & 16?

D. DID THE STATE CONSTITUTION AND STATUTE – CREATING ERICKSON'S RAILROAD RIGHTS OF WAY INTEND THE CORRIDOR TO BE A MULTI-USE ROAD INTENDING A COUNTY ROAD VACATE ORDER AFTER ABANDONMENT?

IV. STATEMENT OF THE CASE

This is a railroad abandonment case of a never developed railroad right of way through state lands granted by legislative action. The State created RCW 79.36.450-500 for railroads to acquire easements through state lands in 1901, CP1 at 104; revised 1907, OB App. B-4; through a process of paying full market value for land and trees, CP at 21, 60, 69; and filing survey maps with the state, CP at 104, 105. In 1909, under these laws CM&PS acquired easements

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[1]Abbreviations in this Petition for Review are:
The Chicago, Milwaukee & Puget Sound Railroad Co.; Chicago, Milwaukee & St. Paul Railway Co.; or Chicago, Milwaukee, St. Paul & Pacific Railroad Co.; CM&PS.
Corrected Opening Brief for Appellant, OB.
State Department of Natural Resources, DNR.
Response Brief of the State of Washington DNR, RB.
Reply Brief for the Appellant, ARB.
Court of Appeals' Unpublished Opinion re., UO or "The Opinion."
Petition for Review, PR.
CMC Real Estate Corporation, CMC.
Olympic Eagle Inc. & Warren L. Stetson Trust, OE.
Laws of 1901 c 173 p 353, rev. 1907 c 104 p 201; Laws of 1901."
Laws of 1901, sec. 7, p 355; "Exclusive Clause."
Federal Interstate Commerce Commission, ICC.
Federal Surface Transportation Board, ICC.

through six sections of state lands in Jefferson County, CP at 59-88. These easements are in western Jefferson County south of Forks, Washington, CP at 40. They were never developed or constructed with rails, CP at 116.

CMPS went through a series of bankruptcies: 1912, not substantiated at trial; 1927, CP at 22; 1945, CP at 23; 1977, CP at 23. The final order of the 1977 bankruptcy was filed November 12, 1985, CP at 23, 51-57. The federal bankruptcy court authorized the sale of ALL assets through a liquidator, CMC Real Estate Corporation, CP at 58. That appointed agent of the bankruptcy court [not "Chicago," UO at 5] sold the property to Olympic Eagle Inc. and Warren L. Stetson Trust, CP at 113. In 1998 Ronald W. Erickson, d/b/a RxR Depot and Railroad Co., acquired ALL the interests of Olympic Eagle and the Warren L. Stet-son Trust in said railroad easements by quit claim deed, CP at 90.

Erickson filed the original complaint for "Quiet Title, Timber Trespass, Declaratory Judgments and Injunctive Relief" against the state DNR in Jefferson County Superior Court on June, 6, 2003, CP at 3. Erickson amended his complaint in a "First Amended Complaint for Quiet Title, Declaratory Relief, Injunctive Relief and Damages," CP at 19 seeking clear ownership, trespass damages, restoration damages as well as declaratory relief and other damages "including but not limited to," those specified, CP at 26. The DNR petitioned a "Motion for Summary Judgment" on January 16, 2004, CP at 29. The trial court signed an order in favor of the state finding abandonment and no material

facts in dispute on February 20, 2004, CP at 136-137. Erickson appealed the case in a number of attempted opening briefs culminating with a "Corrected Opening Brief" filed October 23, 2004. The Court of Appeals affirmed on May 25, 2005 the finding of abandonment of the trial court though avoided interpreting the provisions of The Laws of 1901 railroad statutes as well as some issues not properly brought before the court, UO at 4. The issue of automatic reversion raised by the DNR was addressed in oral argument. The court affirmed abandonment based on the following facts, in conjunction with non-use, UO at 4, 5. Some contested facts (*) were argued as unsupported inferences though the argument failed, UO at 4.

"Chicago never established a rail corridor"

"Chicago never developed a line,"

"Chicago failed to acquire rights over intervening private lands."*

"Highway 101 was constructed parallel to the easements in 1920."

"Chicago sold them to Olympic Eagle a timber company."

"Chicago failed to pay taxes on adjoining rail right of way*.

Chicago allowed adjoining rail right of way to go to foreclosure*.

Chicago sold contested property to avoid foreclosure sale*.

"Olympic Eagle's vice president, declared that the

company had no intent to use the
easements for railroad purposes."

The court believed the rail property was abandoned BEFORE Olympic Eagle sold their holdings to Erickson, UO at 5. Erickson's Request for Reconsideration was denied June 22, 2005.

V. ARGUMENT

A. INTRODUCTION

This is a railroad abandonment case. Erickson did not timely submit facts to contest what the DNR presented for the trial court and consequently a summary judgment was requested by DNR. The trial court judge most likely saw the word "easement" and believed Erickson's legislated railroad right of way easement was equivalent to any other easement. This was evident from the non-railroad case law her lordship referenced at trial as additional authority. The Court of Appeals considered Erickson's additional questions in his brief but found the railroad easement not a highway, UO at 7, not a franchise, UO at 6, and "only easements in land nothing more," UO at 7. The court of appeals cited the bankruptcy court's sale of property for non-railroad purposes as a cause for abandonment also, UO at 6. The court of appeals accepted DNR's "conglomerate identity" "Chicago" for the multiple railroad ownerships of Erickson's easements. There were in fact five separate railroad identities: after 1909, the Chicago, Milwaukee & Puget Sound Railroad Co., CP at 2; 1912-1927, Chicago, Milwaukee, & St. Paul

Railway Co., CP at 22; Post-1927, Chicago, Milwaukee, St. Paul & Pacific Railroad Co., CP at 22; Post-1945, Chicago, Milwaukee, St. Paul & Pacific Railroad Co. (reorganized), CP at 23; Post-1977, CMC Real Estate Corp., CP at 23, 54. The court held CMC responsible for prior actions of railroad companies as contributing to abandonment in spite of the fact that federal bankruptcy court authorized the transfer of the easements as assets, CP at 23.

The challenge left un-addressed by the Court of Appeals was the constructive interpretation of the complete context of the granting instrument, the original version of the Laws of 1901 under which the property was vested, OB at 23-41. That statutory context uses the undefined word "road" to describe railroad rights of way through state lands, OB at 5, as well as an "exclusive clause" making "ANY future grant . . . by the state of the lands . . . shall be subject to the easement. . . . ," OB at 5. The statute's word "easement" and a previous Washington court finding in Roeder Co. v. Burlington N., Inc., 105 Wn.2d 567, 716 P.2d 855 (1986) at 571, supposedly establishes for ALL railroads easements that "when a railroad abandons an easement, the right of possession reverts to the landowner," UO at 5; AND a previous decision in Hanson Indus., Inc. v Spokane County, 114 Wn. App. 523, 58 P.3d 910 (2002) at 535 review denied, 149 Wn.2d 1028 (2003), that established that there is no transfer of assets or property if a previous abandonment.

That is what was. It appears to be a simple abandonment. The complication is that Erickson's easements

were NOT acquired by a "threat of condemnation" but created by state statute using the word "road" and an "exclusive clause;" AND declared an asset and sold by a federal court.

B. THE "AUTOMATIC REVERSION' OF LEGISLATED RAILROAD RIGHTS OF WAY GRANTED THROUGH STATE LANDS VIOLATES THE CONSTITUION'S GUARANTEE OF SEPERATION OF POWERS.

RCW 4.04.010 demands that any application of common law be "not inconsistent with the . . . laws of . . . the state . . . ." The legislature granted railroads the power to condemn property in 1869, RCW 81.36.010 & RCW 81.53.180. The legislature granted cities authority to create railroad easements through cities called franchises, RCW 81.64.010. The legislature granted authority to DNR to create railroad easements through state lands, "The Laws of 1901." Historically abandonment theory was developed on railroad property acquired under possible "threat of condemnation." Abandonment law and eminent domain do not work against the state or against cities that grant railroads, RB at 20, 21 unless with legislated authority to acquiring the use, RCW 81.36.010, 040.

It may be an oversight but there is no RCW for the Laws of 1889 c 17 sec. 4 p 528 granting authority to the courts to abandon railroads, OB at 40. If the law was repealed then the legislature would only now allow courts to

abandon easements at common law or as roads, Laws of 1901 c 90 sec. 6 p 191, OB at 39. Common law was not intended to undo legislated intent, OB at 40. The court may have no authority in this case.

State agencies have only delegated legislative powers. The idea that an agency has inherent authority to interpretive regulations conflicts with the separation of powers and long-standing doctrine concerning the delegation of powers. Uhden, Inc. v. Greenough, 181 Wash. 412, 43 P.2d 983 (1935) at 425-27, and Barry & Barry v. Dep't of Motor Vehicles, 81 Wn.2d 155, 500 P.2d 540 (1972) at 159 [agencies only have the powers that are delegated to them by the legislature]. The DNR does not have inherent authority to ignore an interpretation of the 1901 law's "exclusive clause" in order to apply abandonment to legislated easements. The DNR cannot justify its actions on the basis of enabling legislation, RB at 16, UO at 7. Enabling legislation is not adequate for other state departments to justify department actions, RCW 82.01.060(2).

The federal government did not give to any state court the right to dissolve corporate assets. By federal preemption the ICC and reorganization court have EXCLUSIVE authority to dispose of rail service and PROPERTY they determine as railroad assets, CP at 54, Matter of Boston and Maine Corp. C.A.1 (Mass) 1070, 506 R.2d 2 (1979) at 5. Here the state of New Hampshire attempted to keep a railroad service and property the ICC and reorganization court authorized abandonment. The court

found they should have settled title ownership questions in reorganization proceedings, Matter at 7. The state lacked authority and was too late to reverse the federal action.

The Court of Appeals cites Roeder at 571 to establish that "when a railroad abandons an easement, the right of possession reverts to the landowner," UO at 5. DNR cited Hanson, RB at 7, that refers to automatic reversion as supported by Lawson v. State, 107 Wn.2d 444, 730 P.2d 1308 (1986) at 452 adopting Schnabel v. DuPage Cy., 101 Ill. App.3d 553, 716 P.2d 855 (1985) at 559. Lawson at 449 refers back to Morsbach v Thurston County, 152 Wash. 562, 278 P. 686 (1929) at 568-9. (There is evidence here that the cases that support automatic reversion only apply to private grants. Does the word private infer legislative?) Morsbach does discuss the reversion question and reviewed Abercrombie v. Simmons, 71 Kan. 538, 81 P. 208 (1905) among other cases. Morsbach only held that:

> We will construe the deed, as the parties evidently INTENDED, [emphasis added] as a grant of right of way ONLY, TITLE [emphasis added] to which ceased when the railway company abandoned it as a right of way."

Morsbach did not hold to automatic reversion, the underpinning cases did. Abercrombie and others established that automatic reversion applied to railroad fee ownerships and easements EQUALLY as both were acquired UNDER THREAT of condemnation and ONLY easements.

DNR's grant of easements to CM&PS is more

analogous to street railroads as franchises than railroad easements acquired by condemnation, OB at 10, RB at 20. The Court of Appeals did not think it so, UO at 7. However legislated Congressional land-grant railroads are not subject to common law abandonment, Barney v. Burlington Northern RR. CO., 490 NW.2d 726, (S.D. 1992) at 730, Writ of Certiorari Denied, OB at 24. Abandonment/reversion is not applicable to ALL railroad easements!

Erickson's railroad rights of way were created outside that arena of abandonment law as legislated easement that could never be acquired by threats of condemnation. The Court of Appeals finding of abandonment and automatic reversion is not in harmony with the intent of Morsbach and the underpinning holdings of cases supporting Morsbach.

There is also a separation of powers concept as it applies to un-constructed railroad rights of way, OB at 24. Spokane & British Columbia Ry. Co. v. Wash. & Great Northern Ry. Co. 219 U.S. 166, 55 L.Ed.159, 31 S. Ct. 182 (1911) at 162 established that un-constructed railroads with a reversion clause may only be "taken advantage of by the grantor." This case reviewed a Washington Supreme Court decision. This court found that,

> Until the United States has asserted its right to enforce forfeiture for the breach of these conditions, either by legislative declaring a forfeiture, or by judicial proceedings authorized by law, the title remains unimpaired in the grantee.

Our problem at issue is similar. In Spokane one

railroad company attempted to use the un-constructed railroad easement of another assuming abandonment, Spokane at 161. This case would then argue that only the state legislature or judicial proceeding and not a DNR ruling is required to bring abandonment on state lands. Historically *Writs of Mandamus* are required, ARB at 5, 15 or legislative purchase, OB at 15.

DNR still does not have explicit legislated authority to act on pre-1927 state railroad easements or grants, OB at 17, 43. A statutory interpretation of the "exclusive clause" would have kept the easement in existence against any application of abandonment by the state, including the courts. Courts are a branch of the state. Spokane argues that DNR as the fee owner does not have official standing before the court to bring abandonment on a legislated railroad right of way.

C. THE SALE OF RAILROAD PROPERTY BY A FEDERAL BANKRUPTCY COURT TO A TIMBER CORPORATION ESTABLISHING ABANDONMENT FOR NON-RAILROAD PURPOSES IS A VIOLATION OF THE STATE CONSTITU-TION ART. 1, SEC. 12.

Federal Law preempts the state court's finding, Matter at 5.

Const. art 1 sec. 12 grants individual citizens the same privileges as any other corporation except municipal corporations. In 1888 the state legislature accepted the

"Shifting Public Use" Doctrine into state law, Laws of 1888 p 64, revised Laws of 1895 c 80 p 146, now RCW 81.36.010, 040. The 1881 doctrine of "Shifting Public Use" was found in Presault v.U.S. 24 Cl. Ct. 818, (1992) at 832. Here the doctrine is explained in part:

> Under the doctrine of shifting public use, when an easement is given for public use, such as a railroad, and then put to another similar use, no abandonment will be held to have occurred. . . . There is no change of use involving a new taking when, under legislative authority, the location of a plank-road or canal is con-verted into that of a highway, or of a railroad."[2]

The legislature in 1888, pg 64, RCW 79.36.010, 040, modified the common law doctrine of "Shifting Public Use" so that railroads would compensate counties for displacing public roads for rail construction. With a "Shifting Public Use" acceptable by the legislature the federally authorized sale of railroad property to OE would be lawful. Timber road use of railroad rights of way was common.

The common law for corporate acquisitions of property in 1905 was stated in Abercrombie at 210. Here the court examined the question:

> Was the interest which the railroad company acquired by the deed one which it could convey to

[2]Quote: E. L. Pierce, A Treatise on the Law of Railroads, 233, 234 (1881).

> plaintiff? The general rule is that, in the absence of charter or statutory restrictions, corporations may take, hold, and convey land for any purpose not inconsistent with those of which they were created.

Our state constitution's intent was to modify this common law restriction on corporate acquisitions to allow ANY person or corporation to own corporate rights equally, Const. Art 1 sec. 12, PR App. II, OB at 20. The court misrepresented abandonment doctrine for our state when it referred to Arkansas law and said the "sale for a private use" supports abandonment, UO at 5. Arkansas law is not appropriate for Washington, for a number of reasons, ARB at 4.

Other Washington case law requires ACTIONS of a DESTRUCTIVE nature to abandon railroad property. Prior decisions of this court have required a "destruction" of the right of way, Northern Pacific Railway Co. v. Tacoma Junk, 138 Wash. 1, 244 P.1 (1926) at 119; or "damage" to the servient estate, Netherlands American Mortg. Bank v. Eastern R. & L. Co., 142 Wash. 204, 252 P. 916 (1927) at 211. This is also true in other jurisdictions; "destroyed" the right of way use, Schnabel v. DuPage Cy., 101 Ill. App.3d 553, 716 P.2d 855 (1985) at 676; and "uniquivocal extinguishment" of the right of way, Pencader Assocs. Inc. v. Glasgow Trust, 446 A.2d 1097, (Del. 1982) at 1101. These cases evaluate ACTIONS of a railroad company not statements of corporate officers to determine intent.

Historically the courts have not trusted what a railroad CEO said. It was lawful for OE to acquire the railroad property.

D. THE GRANTING OF AN EASEMENT THROUGH STATE LANDS IS A CONTRACT WITH THE STATE AND SUBJECT TO THE STATE CONSTITUIONAL GUARANTEE THAT NO CORPORATION WILL "RELIEVE" A FRANCHISE.

Subsidiary to this statement are the additional findings that

1. Legislated railroad rights of way are franchises?

Constitution article 12, section 8 of the state Constitution provides that:

> No corporation shall lease or alienate any franchise, so as to relieve the franchise or property held there-under, from the liabilities of the lessor, or grantor, lessee, or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges.

There was much talk about whether the state rights of way through state lands were a franchise, RB at 20. If it was the legislature has authority only to abandon, OB at 24. The Court of Appeals stated that the legislature did not grant a franchise, UO at 6. This decision is not in harmony with other decisions of the state. Nicomen Boom Co. v. North Shore Boom & DrIving Co., 40 Wash. 315, 82 P.412 (1905)

at 325, referred to railroads filing plat maps as franchises, OB at 10. Maps filed with the DNR land office for Erickson's easements were called "survey maps" by the legislature, The Laws of 1901. Although the Nicomen comment is not a court finding it does represent the court's historical perception of the law in 1929: railroads that filed plat maps were legislated franchises. [Judicial notice of CM&PS maps filed in the DNR records office would show Erickson's are titled, ". . . Right of Way Plat."]

Vague route maps are filed for railroad extensions, RCW 81.36.060. Boom companies use to file "a plat or survey," 1910 Rem & Bal. @ 7121. RCW 79.36.440 required roads filing "petition and plat." The Laws of 1896, c 89 sec. 35 p 245 required plat maps for public roads through STATE LANDS to be filed with the Commissioner of Lands. Nicomen at 325 referred to OUR state plat maps and not other states as DNR wrote, RB at 17fn. Railroads filed plat maps with the DNR in compliance to the 1896 Road Laws until the law was changed in 1901 and called "survey maps." Railroads through state lands were treated as public roads until 1901 and when The Laws of 1901 granted them "exclusive use" and perpetuity. From early 1800's to 1940 railroads were pushing legislation to keep the public off their rights of way.

As a franchise the declaration of Olympic Eagle could not "relieve" or lesson the existence of Erickson's railroad easements, OB at 20.

2. This grant violates due process protected by federal law and Const. Art 1 sec. 3 & 16?

Grants of the legislature without a specific time limit to construct ALSO constitutes a perpetual franchise protected by the federal Contract Clause. In Northern Pac. Ry. Co. v. Hirzel 29 Idaho 438, 161 P. 854 (1916) here the court found that railroads were not permitted to take title to Trust Lands. Nebraska Telephone Co. v. City of Fremont 72 Neb. 25, 99 N.W. 811 (1904) also. Perpetual grants are treated differently and called "grants in fee," OB at 14. If the grant is not a franchise than claiming abandonment is still a violation of due process and Washington Constitution article 1 sections 3 and 16.

E. WASHINGTON LAWS AND CONSTITUTION DID INTEND PUBLIC USE OF RAILROADS AS MULTI-USE ROADS WITH THE INTENT OF APPLYING A COUNTY ROAD VACATE ORDER?

Erickson argued the canon of *in pari materia* and the legislated intention of railroads being public roads in his brief, OB at 31, 39. He showed possible harmony of such a constructive interpretation of the statutes' use of the word "road" in The Laws of 1901 with other state legislation, OB at 23-41. The Court of Appeals found that such arguments were "Inapplicable Statutes" saying that the "grant to Chicago was an easement; it was not intended to be a public highway. . . ," UO at 7. [The Court of Appeals used the word "highway" instead of "road" as used in the The Laws

of 1901. Unidentified words are understood at common usage, Franson v. Board of Nat. Res. of Wash St., 66 Wn2d 673, 404 P2d 432 (1965) at 674-5. "Road" was used in early state legislation and judicial commentaries to describe railroads, OB at 28, OB App. A, because they were roads. Some states repealed railroad laws that declared railroads roads, OB at 27. Our state has not.

"[T]he legislature does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment," Sellen Constr. v. Revenue, 87 Wn.2d 878, 558 P.2d 1342 (1976) at 883. Every word in legislative acts is to be given meaning, International Paper v. Revenue, 92 Wn.2d 277, 595 P.2d 1310 (1979) at 281 ("[E]ffect must be given, if possible, to every word in a statute.") The Court of Appeals should have recognized the distinct language of The Laws of 1901 and provided meaning to the plain language to the word "road."

Erickson argued the application of county road vacate orders to "ANY" road in 1855 to be applied to the Northern Pacific Railroad, called a "road" (OB at 20) ten times by the 1857 legislature, OB at 35 & OB App. C-1. Three times the legislature adopted railroad laws and revised the county road vacate process in the same legislature using the word "road" in both legislations, OB at 39. Such legislation clearly established the intent to apply a road vacate order process and gives understanding as to why early railroads fought for exclusive use of their right of ways until 1942, OB at 30.

The public interest has been to retain public use of

railroad rights of way. Abandonment is often argued by a county or citizen group to retain the rail corridor for trail (primitive road use) and not allow a reversion to fee owners. In 1986, by a vote of 2 to 1, Lawson at 458 found unconstitutional RCW 64.04.190 that legislated public use of abandoned railroads, Laws of 1988 c 16 p 34. The Lawson court did not examine abandonment/reversion in light of the state Constitution and early railroad law's intent to guarantee railroad rights of way as multi-use roads for the public need. Past Justice Utter held to the public interest in railroads as transportation corridors, Lawson at 464-7, OB at 40.

The legislature changed the words "such road" in The Laws of 1901, now RCW 79.36.460, to "railroad" in 1967, OB at 29. Another fundamental rule of statutory construction is that the legislature deemed to intend a different meaning when it uses different terms, State v. Roggenkamp, 153 Wn.2d 614, __P.3d__ (2005) at 625. That change possibly stops new railroads from becoming roads. Public railroads created before 1967 were vested with the possibility of having public access, ARB at 20.. The people have a right to reclaim their lost rights.

Since 1889 our Const. art. 12 sec. 13, OB at 28, RB at 19, and early railroad laws establish railroad "roads" as "post roads," OB at 26, 27; and transportation corridors for communication uses, OB at 13, 27. This fact is supported by Kershaw Sunnyside Ranches, Inc., v. Yakima Interurban Lines Ass'n, 121 Wn. App. 714, 91 P.3d 104 (2004), OB at 26. Here the court allowed a railroad right of way to be

abandoned and the right to establish communication lines retained by the railroad company as "incidental use." Const. art. 12 sec. 19, OB at 26, guarantees railroad easements something more than "only an easement in land," UO at 7. Railroads are an easement in a multi-use transportation corridor. The trespass laws of Washington allowed public use of single track railroads, OB at 29, 30. Federal law allowed roads on federal railroads until 1920, OB at 22, 30, 33. Bridge laws presumed public access onto railroads, OB at 29. Irrigation use was allowed on railroad rights of way, RCW 81.36.130, OB at 27. Historically, Washington railroads were intended to be more than simple easements being created with multiple public interests and sometimes outside of the common law of abandonment and automatic reversion. There was also no Court of Appeals comment on a "Public Trust Doctrine" on railroads established in 1856 in Erie & N. E. Railroad v. Casey, 26 Pa. 287, 3 Pitts. Leg. J. 261 (1856), OB at 34, as it applied to early state railroad legislation of 1857; or the fact that early railroads "shall be and remain a public highway," Lake Superior and Mississippi RR Co. v. United States, 93 U.S. 442, 3 Otto 442, 23 L.Ed 965 (1877) at 966, OB at 32. This was the common expectation in law as we created a state Constitution and early railroad legislation calling railroads "roads." There was great oversight in the Court of Appeals not placing abandonment and reversion rights in the proper legislated context of railroad law. Instruments granting railroad rights of way are to be interpreted within the proper

historic context giving meaning to every word and honoring original intent. It is time the people of Washington regained their lost reversion rights on their rail roads.

VI. CONCLUSION

For the forgoing reasons Petitioner Erickson asks the Justices of this Supreme Court of Washington to accept this Petition for Review and reverse the Court of Appeals finding of abandonment and declare all public railroads public roads requiring a road vacate order for reversion.

Dated this _____ day of July, 2005.

Respectfully Submitted
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APPENDIX (deleted for printing)